PUBLIC DOCUMENT. No. 29.

SECOND ANNUAL REPORT

OF THE

CONTROLLER OF COUNTY ACCOUNTS

FEBRUARY, 1889.

BOSTON:
WRIGHT & POTTER PRINTING CO., STATE PRINTERS,
18 POST OFFICE SQUARE.
1889.

Commonwealth of Massachusetts.

OFFICE OF THE CONTROLLER OF THE ACCOUNTS OF COUNTY OFFICERS, OFFICERS OF INFERIOR COURTS AND TRIAL JUSTICES,
No. 9 PARK ST., BOSTON, Feb. 1, 1889.

To the Honorable Senate and House of Representatives.

In compliance with chapter 438 of the Acts of 1887, as amended by chapter 275 of the Acts of 1888, I have the honor to submit my second annual report, being a compilation of the material parts of the returns of county officers, clerks of courts and trial justices, in tabular form, with such facts and explanations and such suggestions and recommendations as in my judgment will tend to a simple, uniform and economical method of accounting for public funds. For want of the authority given in the last Act above named, my first report was a mere compilation of tables, without suggestions or recommendations. As the office is a new one, in name at least, covering a field much of which has been hitherto unexplored, a report of its operations for the year and a half of its existence would seem to be called for, in order that its utility or uselessness may be demonstrated.

The Act establishing the office was approved June 16, 1887, and my appointment followed on the twenty-third day of the same month. The duties prescribed are identical with those imposed upon the Commissioners of Savings Banks by section 37 of chapter 23 of the Public Statutes, except that the present law excludes the treasury of Suffolk County, and includes all the inferior courts and trial justices. The municipal, district and police courts, having no clerks, and trial justices, have not heretofore been subject to any public supervision. From this latter fact, the accounts of the justices and clerks of the inferior courts, and of the trial justices, first engaged attention. As the law

established a new time, as well as a new method, of making returns of public funds, a circular was issued to all the officers concerned, suggesting that the cash books be balanced as of July 1, 1887, so that a starting-point might be fairly fixed. It soon appeared that a cash book was not a part of the records of many of the trial justices and the inferior courts, and in three or four of the smaller counties the same thing was true of the clerks of the higher courts; the cash accounts, such as they were, being kept on the dockets, files, and memoranda of every description. Some of the inferior courts had fairly good methods of keeping cash accounts, but there was a conspicuous lack of uniformity.

After visiting several of the clerks and trial justices, for the purpose of inspection, and for gathering samples of the different ways of keeping accounts, as well as samples of dockets and forms used in criminal proceedings, it seemed best to call a meeting of the officers concerned, for conference, and, if possible, for agreement as to what would be simplest and best to accomplish the desired object; wishing, if I could, to avoid any necessity of arbitrarily prescribing what the law permitted me to prescribe, — a uniform system throughout the Commonwealth. The inferior courts of Suffolk County being peculiar and limited in their jurisdiction, the clerks of those courts were first invited to assemble, and afterwards the clerks and justices of all the other inferior courts. The result was most satisfactory. The crazy-quilt I had to exhibit, in the shape of the infinite variety of dockets, cash books, and forms in use in the different courts, both amused and amazed the assembled officials. All had an opportunity to express their opinions and their wishes, and after the meeting dissolved it was very easy to prescribe a new cash book, to be used in all the inferior courts and by the trial justices; and by Oct. 1, 1887, the new system went into substantial operation throughout the State. The design was a book which should, in all needed detail, set forth the daily cash transactions of the various courts, after the method of business men. Of course all the clerks, justices, and trial justices were not book-keepers, and slow progress was made by many, in the

new work. But, almost without exception, there was a faithful attempt made to comply with my wishes. It was hard for some, who had had no cash book, and harder for others, who had used half a dozen, to keep a single book which should accurately contain all needed entries of receipts and expenditures. But, after trial of more than a year, I think I can say there is now universal acquiescence in the belief that the new system is a good thing. One justice writes me that it is a positive relief to him to go to bed at night, feeling that, if he should die before morning, his accounts are in such order that his successor could take up the work where he left it, without the slightest embarrassment or confusion. In half a dozen instances, my clerks, in making their examinations, have found the cash books not written up. This, in most cases, comes from pure shiftlessness; and I shall suggest a remedy when I reach the subject of needed legislation in this report. The law requires us to visit these officials without notice, and by their neglect we are occasionally compelled to go a second time, at the expense of the State. Of course we frequently find parties absent, and for that reason have to make a second trip. But, if the books are kept written up, and the vouchers properly filed and numbered, an examination can be made practically as well as if the book-keeper himself were present.

Trial Justices.

As very many of the trial justices are not lawyers, it is not to be expected that their duties will be done with that clerical accuracy which is looked for in the courts; and at first we found evidence of considerable carelessness and looseness, not unlike the condition of things found in 1874, after the investigation of that year, as reported in House Document No. 18 of the year 1875. Since that investigation resulted in no legislation whatever, it is not singular that some of the evils of that day have existed until the present. I early discovered that the bane of the trial justice, as it has been also of many of the clerks, was the "unclaimed witness fee." The explosion of 1874 was over the unclaimed witness fee, as officers never fail to call for and obtain all their fees.

It is a remarkable fact, that, until the law of last year, chapter 180, there was no statute *compelling* anybody, at any particular time, in any court, to pay witnesses. By section 4 of chapter 217 of the Public Statutes, the costs, in general, of criminal prosecutions, are to be paid by the counties, and the treasurers of course are charged with that duty. Even when the defendants paid the costs, including the witness fees, the trial justice was not compelled to pay the witnesses at the time of the trial. Section 6 of chapter 217, Public Statutes, provided that he might do so at his discretion. If he did not, he was obliged to turn these fees over to the county treasurer, after a certain length of time; and the books of the treasurers in some of the counties are disfigured to-day with a ghastly list of claims of sixty cents each, due to poor witnesses who were obliged to go into court and perhaps remain all day, for the small sum of sixty cents, and then be turned away without its payment. They lost one day in giving their testimony: they cannot afford to lose another to collect the inadequate fee.

A partial remedy was provided, in 1878, by the passage of the law which became section 36 of chapter 154 of the Public Statutes. This Act of 1878 made it optional whether the witness should be paid or not, at the time of trial. Under its provisions many clerks and some trial justices paid all witness fees. The practice in Suffolk was to pay in the inferior courts, except in cases of appeal or holding to the grand jury; and the "pay-roll tailings" in the accounts of the treasurer of Suffolk tell the miserable story of practical confiscation of the fees of witnesses who testified in the lower courts. It was claimed that the withholding of such fees was a security, in addition to the usual recognizance of witnesses; but it was only an additional security of sixty cents in each case.

The opinion is freely expressed, by those familiar with the courts, that the result was the contrary of what was intended. Hundreds of cases sent to the superior court, on appeal, or to the grand jury, are settled without the presence of witnesses, and without their knowledge; and they never call for their fees. In many cases, it is believed parties who witness the commitment of crime have denied

all knowledge of it, because they were not willing to be drawn into court, and sent out without their little fee. Chapter 180 of 1888 changed the word "may" to "shall," and with one stroke of the legislative pen practically did away with the nuisance of unclaimed witness fees, and provided for justice to be done at the same time to innocent parties. As trial justices are liable not to have in their hands fees returnable to the counties, adequate to pay witnesses, the new law provides that they may make requisition on the treasurers, for sums not exceeding twenty-five dollars per month, for this just purpose. This law was not received with much cordiality by some of the treasurers; but the response from the people was not to be misunderstood, and all friction with the treasurers will be done away with as soon as the law gets into full operation. They will be helped by it, and not hindered. The open disregard of the law in some of the counties will be noticed hereafter.

Another fact tended to disparage the proceedings of trial justices; to wit, that the law put so low an estimate on their records, dockets and files. As the law stood prior to last year, the papers of a trial justice were purchased by himself, considered his own property; and when he died, or retired from office, all his records could be sold for old paper, or burned at pleasure. The notary, protesting a five-dollar note, has his records carefully preserved by the law; but a trial justice, who could send a man to jail for a year, or a child to a reformatory during minority, had no safeguards thrown about his official records. Chapter 285 of the Acts of 1888 provides that counties shall furnish the necessary blank forms, dockets and books of records of trial justices; and chapter 211 of the same year provides for their preservation when from any cause the office becomes vacant. The cash book I prescribed for trial justices was paid for by them. I did not assume that I had authority to compel trial justices to buy a book with their own funds, but I believe every one of them did do so, showing a cheerful compliance with my request. With the aid of the new books and blanks, and the frequent inspections now provided by law, a marked improvement is to be expected in the service of these important officers.

Uniform Blanks.

Chapter 285, above referred to, provides that the treasurers shall cause to be printed blank forms and dockets for the inferior courts and trial justices, except the courts in Suffolk County. I believe there is general concurrence of opinion that such uniform blanks are essential to uniformity of taxation of costs; and, as I examine the books and vouchers from day to day in the different courts, the more certain I become, that, until we have uniformity in the machinery part of the blanks in use, we shall not have any approach to uniformity of taxation. If the taxable costs are printed on the blanks, carrying with them the known approval of the Attorney-General, clerks and trial justices will not strike out for themselves, as is done now in too many instances.

The introduction of the new blanks and dockets is going on as fast as is practicable, I presume, and will not be fully accomplished for some time to come. Some of the treasurers complain that a new burden is imposed upon them by this bill. I supposed, when it was drawn, that all the treasurer would have to do would be to transmit a blank form, prescribed by the Attorney-General, to the printer, and distribute the blanks on call. I apprehend no difficulty in this matter. A little time will cure all.

The Higher Courts.

I next prepared a sample page of a cash book which was deemed suitable for the clerks of the supreme judicial and superior courts, and transmitted the same to those officers, inviting their suggestions and criticisms. I knew that many of them had fairly good methods of keeping their accounts, but the most of them crowded many items into one line, something like the following, — "taxing and ex. .50, sci. fa. .40, t. f's. .80, entry and t. f. 1.40, order and copy 2.00," — a sort of binomial theorem, but reaching no result, the lines often not being footed or carried out at all, and no name of any person from whom any item was received appearing. To pick out from such a page the items for which there was any voucher, would be an interminable task. To my circular the answers were courteous but varied. With

that wise conservatism that characterizes the profession, one veteran clerk wrote me that his office was not a banking institution, nor yet a bureau of statistics, but closed with a cordial promise to co-operate in any plan of book-keeping that should seem best for the common good. Accordingly, I prescribed a form, which was substantially adopted in all the counties except one, and took effect Jan. 1, 1888. And so it happens that now, from the trial justice on the island of Nantucket to the clerk of the supreme judicial court for Suffolk, a substantially uniform system of book-keeping is in force in all the courts. Of course, no iron rule of uniformity has been attempted; but the different courts, with their different jurisdictions, limitations and wants, have been considered, and a system adopted which succinctly sets forth the cash transactions of the courts from day to day, after the methods of modern book-keeping.

It is not claimed that the best system has been adopted; but *a* system has been put into complete practical operation, and, as its defects are made to appear, they can be easily remedied. A law of last year makes the clerk's cash book a part of the records of the court, so that hereafter a clerk, when retiring from office, will not deem the cash book private property, and carry it with him, as has been the practice heretofore.

Varied Fees and Unequal Taxation.

Having launched our system of book-keeping, and prepared the blanks upon which to make the annual returns required by the law, my clerks and myself entered upon the duty of making the prescribed examinations of the various officers' accounts; the clerks taking the inferior courts and trial justices, and I devoting my attention to the clerks of the courts, the treasurers, the sheriffs and masters of houses of correction. We charged ourselves specially to notice the want of uniformity in taxing costs in criminal cases, and to note any illegality of charging, whether from accident, want of knowledge of the law, or intentional. That any information herein given may be specific and not general, instances will be cited as actually found. The fees in criminal prosecutions are supposed to be fixed by statute, and therefore the

infinite and bewildering variety found in the charges is most surprising. As the taxation in the inferior courts is in general supervised in the superior court, I distrust my own judgment where I find myself not in accord with the revising power, and refer to the Legislature for final decision.

Fee for Trial.

Perhaps the most important fee upon which there is no uniformity of taxation, is that for the "trial" in the inferior courts and before trial justices. The provision of the Statutes is as follows: "For a trial, or for a hearing or examination on a plea of guilty or *nolo contendere*, one dollar." (Public Statutes, chapter 199, section 2.) The question is, ought one dollar to be charged where the defendant pleads guilty, or *nolo contendere?* Probably, in half the courts, the one dollar is charged, no matter what the plea may be. We have found no trial justice who does not make this charge. As this fee goes to the trial justice, whether the defendant pays or not, it is clearly for the interest of the magistrate to tax this fee. In the case of the inferior courts, the fee, if paid, goes to the county.

There is some *color* to the argument in favor of the charge, as there is, or may be, a "hearing" on the question of the sentence after the plea of guilty has been recorded. If the charge is wrong, then tens of thousands of dollars have been wrongfully taken from defendants and from the counties, under this statute. The ambiguity, if any exists, should be removed. If a defendant pleads guilty, and saves the State the time and expense of trial, it would seem fair that he should pay less costs than one who contends. Probably nine out of ten defendants in prosecutions for drunkenness plead guilty.

Lock-up Fee.

The next important fee, in relation to which the practice varies, is the so-called lock-up fee. When we began our examinations, it was almost the universal practice to find upon the forms in use the phrase "lock-up fee;" and in two-thirds of the cases there was a charge of fifty cents for this fee, and then another charge for "feeding the prisoner,"

or for "keeping the prisoner;" and in some cases one general charge of a dollar would be made, under the head of "keeping the prisoner." In Hampden County there were three police and two district courts, and no two of them taxed the "lock-up fee" at the same rate. If I am right in my view of the law, there has been no "lock-up fee" since 1876. The present statute is found in Public Statutes, chapter 27, section 34, and provides that, for "detention and support" of a prisoner for a full day of twenty-four hours, or any fractional part thereof, fifty cents, and no more, shall be paid. This requires the town or city keeping the lock-up both to keep and to feed the prisoner for fifty cents per day. By some conventional rule, which I have never understood, this fee is or has been charged in all cases, whether the defendant was in the lock-up or not. A city which has from one thousand to ten thousand arrests in a year, obtains a very fair rental, in this way, for a lock-up which is usually a part of the police station. It is familiar, that, under Public Statutes, chapter 212, section 16, a summons must issue, and not a warrant, where "there is no reason to suspect that the accused will evade." A statute regulation, requiring the return upon a precept to show whether or not the defendant was in fact in the lock-up, might prevent abuse of this fee.

The Fee for a Mittimus, Capias or Subpœna.

It is bewildering to contemplate the practice that prevails in all the courts, from the lowest to the highest, in the service of these important precepts. In general, the costs of the commitment of a prisoner are not paid by him, in case he pays the fine and costs of prosecution after commitment. If the costs of the mittimus were paid as the other costs are paid, thousands and thousands of dollars would be saved annually to the counties. It is claimed by many that the expense of the mittimus is not a part of the costs of prosecution. In the Suffolk jail the costs upon the mittimus are collected by the sheriff. In the district court at Salem the costs of the mittimus are added by the clerk and put into the mittimus, and are collected. The law and the practice should be uniform. The mittimus is the "fruit"

of the law, like the execution in civil practice; and the latter is always regarded as part of the costs of a suit, the fees for the levy being fixed as they are for the service of a mittimus.

The county, except in Suffolk, at any rate, in every case of commitment has to pay the costs of the same to the officer who served the precept. By the provisions of Public Statutes, chapter 215, section 28, "the officer who executes sentence in a criminal case, shall, without charging travel therefor, return the precept with his doings and fees indorsed thereon to the clerk or magistrate issuing it, who shall tax, allow and certify the fees *as a part of the costs in the case*. In case of commitment, the officer shall leave with the jailer or keeper of the prison an attested copy of the precept, with his return thereon." The statute fixes the price of the mittimus at twenty-five cents, and also the price of the copy to be left by the officer, at the same rate; and by chapter 217, section 14, provides that a defendant may pay the fine and costs of prosecution to the jailer or master.

It would seem that the intent of the law is that the cost of the mittimus is to be paid as part of the costs of prosecution. Believing that to be so, and to end the embarrassment, I suggested to the House judiciary committee, in 1888, that a law be passed to settle the question. Accordingly, a bill was reported (House Document, 1888, No. 211), which passed the House and was rejected by the Senate, presumably on the ground that the Act was merely declaratory, and therefore not necessary. It is obvious that the cost of commitment in many counties is very great; for instance, from Williamstown or Sandisfield to Pittsfield, from Quincy to Dedham, from Athol to Fitchburg or Worcester, from Provincetown to Barnstable, from Wareham or Middleborough to Plymouth. And, as if to make the costs of commitment as high as possible, the statute provides that, "In the service of a mittimus, if the journey from the town where the prisoner is held to the town where he is to be committed can be performed by railroad, no allowance shall be made for the use of a horse and carriage." (Statutes of 1885, chapter 254.) Under this law an officer

may not drive from Needham or Brookline to Dedham with a prisoner, but must come to Boston and transfer to another railroad, and spend a day substantially in the service. So, in going from Waltham or Somerville to East Cambridge, or from Wareham or Middleborough to Plymouth.

One difficulty I conceive to be the fact that in many cases, in the highest and the lowest courts, the officers do not return their fees on the copy of the mittimus left with the jailer, as required by law, *supra*, and therefore he has no data whereby to tax the costs of commitment.

It is urged, that, in making the mittimus, the clerk or magistrate has no right to put in the body of the precept the fees for commitment, because it is entirely uncertain what the fees will be. If the officer goes with his own team, he may charge fifteen cents a mile one way, and if he hires a team, he must charge the actual amount paid for the team; and if he goes by rail, he may charge the actual fare for self and prisoner (chapter 254, Statutes 1885, *ubi supra*); while, if there be more than one defendant committed at the same time, only one service and one travelling fee shall be allowed; and it would be impossible for the clerk or magistrate to know in advance which one of the prisoners will prove "the additional one," and therefore have nothing but a copy taxed against him. (Public Statutes, chapter 199, sections 32, 34.) There is weight to the objection, it must be admitted. The court has not adjudged, at time of ordering the commitment, what those costs are; and, so long as officers make such preposterous charges for serving a mittimus, it might not be safe to allow the jailer or keeper to charge what the officer returned as his fee on the precept, although that I believe is the present theory of law.

Some examples of charging upon a mittimus are given as illustrations. Within two days a magistrate has told me an officer committed four tramps on one trip, and returned a charge of $16.00 for carriage hire, — a riding in state, to be sure! And, if the magistrate should cut down the fees, the officer would take his next batch of tramps right through the town where the faithful magistrate held court, to another, in another town, who would be more lenient in respect to fees. This is a frequent case in practice.

Another thrifty city marshal uses his own team in transporting prisoners about one mile; and, if there are more than one, makes separate trips for each one, and recovers seventy-five cents on each precept for use of a team. And this practice is not uncommon. The great and often unavailing struggle in all the courts, is to prevent overcharging by officers.

One practice, more common in the superior court than anywhere else, is for an officer to telegraph or telephone for officers and witnesses to appear on a given day; and the said officers and witnesses, being under recognizance to appear, will come in response to the message; and then the officer will summon them and return that he did so, and collect fees as for travelling the distance to the town or city where the officers and witnesses summoned resided, and will draw fees accordingly. One more instance, and I leave this particular fee. In examining the accounts of the master at East Cambridge, I found copies of mittimuses from the court at Cambridge and from the police court of Lowell. In the former it appeared that full costs were taxed on several precepts served by the same officer upon the same day, while in the case of Lowell it appeared that only twenty-five cents for a copy was taxed under the same circumstances. Other examples of similar varieties in taxation might be mentioned, but would serve no useful purpose. The statutes are not very clear in fixing the rates of taxation upon a mittimus. (Public Statutes, chapter 199, sections 32, 33, 34.)

It is equally difficult to properly tax the costs for serving a subpœna. No inexperienced officer can pretend to accuracy, and experienced clerks are often puzzled in an attempt to be exact. (Statutes 1882, chapter 215.) So long as the law allows "constructive travel" to be charged for, it will be almost impossible to check the tendency to overcharge. The statute last cited contains the provision that, "upon a subpœna, the court to which the same is returnable shall reduce the fee for travel to a reasonable amount for the service performed, whenever the travel charged has not been actually performed by the officer who has made the charge." Under this provision officers will make charges, trusting to chance, that, by good luck, the

same will be allowed. The New York rule, that an officer shall certify to the exact number of miles travelled in serving a given precept, is the better one.

Fees in Naturalization.

Some of the courts charge two dollars for first papers, and three for second, in matters of naturalization, whoever makes the papers. (Statutes of 1885, chapter 345, section 6.)

Bastardy.

In many courts no costs are charged for issuing a warrant in bastardy process. The statute fixes the fee for a warrant at one dollar and fifty cents. Poor girls often cannot pay this fee and pay the officer for service of the warrant. This process is subject to some abuse, but by no means so much as the law giving boarding-house keepers a lien for board bills, a law which is used mainly for collecting debts by criminal process, and ought to be repealed. Bastardy process being criminal at its inception, it would seem proper to put it on the same basis as other criminal process.

Fees in Poor Debtor Cases.

I find the practice varies as to fees in poor debtor cases, under chapter 419 of the Acts of 1888. In the municipal court of Boston, and in some other courts, the fees are turned over to the counties, while a few judges retain the fees to their own use. I sought the opinion of the Attorney-General, who made answer that where the judges sit as "courts," the fees must go to the counties; but where they sit as "magistrates," they may retain the fees. If this was not the intention of the Legislature, an amendment, at an early day, is quite desirable.

Fees in Search Warrants.

In warrants for the search for intoxicating liquors are found strange diversities of practice. In Suffolk and in a few courts in other counties, no charge is allowed for serving a search warrant where no liquor is found, except for expenses incurred. In some courts one dollar is allowed for "attending court" to return the warrant in such cases.

It would seem an idle ceremony to attend court for the sake of returning a warrant in such proceedings. In one county, with four or five courts, we found costs taxed in unsuccessful search warrants, varying from fifty-eight cents to $1.85, for officers' fees; this, of course is in addition to the actual expense of aid, carriage hire and other necessary expenses. No process is more abused than the search warrant. It will be wise, perhaps, to cut off all fees in unsuccessful searches where the service is made by salaried officers, throwing the expense upon cities and towns. But, in the country where these warrants are served by constables who receive no compensation except their fees, it is only just that they be allowed costs; but these should be carefully guarded. An officer from a town in the interior recently told me that he always charged two dollars for aid, and one was paid back to him by way of "draw-back." He justified this on the ground that the compensation is inadequate; and it is indeed so.

The attention of the committee on the liquor law was called to the great expense of search warrants, and chapter 277 of the Acts of 1888 was the result. That act puts upon defendants in liquor cases, who have been convicted partly by the aid of a search warrant, a portion of the expense of making the search. Such a law is in operation in other States, and is believed to work satisfactorily. Before leaving this branch of the report, I will add that many of the irregularities in taxation have been corrected when attention was called to the law.

The Municipal Courts.

These are all in Boston. Their jurisdiction is peculiar and mixed. They appear to be a growth, a mozaic, — a patchwork, Judge Soule's Commission called them, in 1876. I think, in the process of the make up, a stitch has been dropped, greatly to the advantage of the Commonwealth. I refer to the fact that the costs in unpaid cases in the inferior courts of Suffolk County are not certified to the superior court, corrected or revised there, and transmitted to the treasurer of Suffolk for payment, as is done in all the other counties of the State, at an annual expense heretofore of

from ten to fifteen thousand dollars. That is to say, in Suffolk County, where about half the criminal business of the State is done, the costs not paid in the inferior courts by defendants go straight to the auditor of Boston, whose salary as county auditor is only eight hundred dollars; while in the other counties it is deemed essential that these costs shall go to the superior court for revision, at an expense named above. By referring to my report for 1888, it will appear that the clerks of the courts (this means, of course, the clerks of the superior court) received in fees for the year 1887, from criminal costs, the sum of $26,385.82. The greater part of this vast sum came from the service of the clerks in passing the costs of the lower courts through their offices to the several county treasurers. These were conceded to be the "key fees" of the clerks. (Adams *vs.* County of Hampden, 13 Gray, 439, 442.) The clerks now having fixed salaries, they have no interest in maintaining the present roundabout system if a better one can be devised. I think the Suffolk method is a better way, cheaper, more business-like, and prompt. But I do not find any law for it. I am aware that formerly the municipal court of Boston sent its expense bills directly to the treasury; and it may be that the same provision of law exists to-day. I am also aware that Suffolk has a county auditor, to whom all bills are to go; but that, I take it, is an additional check and security, and the law establishing that auditorship did not repeal any statutes relating to the duties of the courts and their clerks, unless it be the fact that the repeal of all laws inconsistent with chapter 256 of the year 1879 (the Act establishing the Suffolk auditorship) worked the repeal of the provisions now under discussion. Here are a few specific cases. The police court of Chelsea was established in 1855. By Act of 1882, chapter 176, a clerk was appointed for the court, "subject to all the provisions of law applicable to clerks of police courts." By chapter 274, Acts of 1887, a clerk was appointed for the municipal court of the Roxbury district of Boston, with precisely the same duties prescribed as in the Chelsea Act of 1882. There can be no question that it is the duty of clerks of police and district courts, outside of Suffolk courts, to certify costs and

incidental bills of expense to the superior court, under provisions of Public Statutes, chapter 154, sections 37, 38, 43, 53; and chapter 217, sections 6, 16. The advantage of the Suffolk method may be seen at a glance: —

1. Monthly payments are secured, whereas, in five counties of the State, to wit, Nantucket, Dukes County, Barnstable, Berkshire and Hampshire, payments are made only twice per year; while in Worcester payments are four times a year, and in Plymouth, Bristol, Franklin, Norfolk, Essex, Middlesex and Hampden, they are made three times a year, or as often as the superior court for criminal business is held in the various counties.

2. The expense and labor of the Suffolk system is trifling in comparison. Instead of sending up an abstract or copy of the record in each case, as is done elsewhere, in Suffolk the costs upon the different processes are all put upon an abstract or schedule, and sent to the auditor. This plan could be readily extended so that the "pay-roll system," now so popular in all the counties, with one or two exceptions, would take the place of the present roundabout and expensive way of paying criminal costs; the reduction in labor, in my judgment, amounting to at least eighty-five per cent. The exact provision of the Statute is this (chapter 217, section 6): "In cases in which trial justices exercise final jurisdiction in criminal prosecutions, they shall certify to the next superior court the costs by them taxed and allowed, which taxation shall be examined by the court or its order, any errors therein corrected, and the costs allowed and made up in the general bill of costs for the same term of court." "Fees and costs in criminal cases, not received by the justice or clerk, shall be made up, taxed, certified, allowed, and paid as is provided in prosecutions before trial justices." (Public Statutes, chapter 154, section 37.) This law was established when justices of the peace held court in every town, and when crime and criminals were comparatively unknown in the Commonwealth.

By the return of the Prison Commissioners for 1887, it appears that in that year 68,400 arrests were made in Massachusetts, and of these 55,853 were made in cities where there are inferior courts, with judges and clerks. Probably not

more than one-tenth of the criminal business of the State is now disposed of in trial justice courts. Have we not then outgrown the system of one hundred years ago? And ought police, district and municipal courts to be longer compelled by statute to conform to the methods provided in prosecutions before trial justices? I have already said there is no uniformity in the manner of certifying costs to the treasurers from the inferior courts. There is no uniformity in the method of their examination, and payment after reaching the court.

Said Attorney-General Marston, in his annual report for 1879: "I have reason to know that there is great lack of uniformity in the method of taxation of costs in criminal cases, and in the scale of fees taxed and allowed in the different criminal law districts of the Commonwealth. There ought to be such legislation as will establish uniformity, which will also tend, I think, to economy of expenditures in this important branch of the public service." In 1880 this same recommendation was repeated, in stronger language still.

There is no uniformity as to the official who examines the taxation sent up to the superior court, as provided in the statute last above quoted. The language is, "which taxation shall be examined by the court or its order." Who is to do this great work? The court cannot do it, nor as a matter of practice does the court make any order in the premises. The law does not specifically impose this duty upon district attorneys, and if it does by implication, the work comes to them at the end of a term, when they are worn out with the stress and strain of a long criminal sitting, or in haste to attend to similar duties in another county in their district, when there can be little interest in the number of miles a witness may have travelled in a case tried six months previously in one of the district courts of the State. I venture to quote further, and from some of our most eminent district attorneys, who testified before the committee of the House in 1874. The district attorney for the southern district, Mr. Marston, testified as follows: "I have not been able to supervise the charges of justices and officers as closely as they ought to be. When, in the

examination of costs of lower courts, I have found the net amount of taxation larger than I thought it should be, I have scrutinized the items; otherwise, I have not. Thus, if the whole amount of costs in a liquor seizure case was say $15, and I had fixed upon about that amount as the lawful aggregate costs, I did not examine the details of charge. When a justice has done a small business, I have not given much time to examine his fees; and I have not paid as much attention to the taxation of a justice in whom I had confidence, as one who I thought was inclined to overcharge. Costs of municipal and district courts I have not examined closely, because it is the duty of the clerks, and they know, much better than I can know, the facts which determine what is proper under the Statutes. My time will not allow of my going over each item of charge; it would take an immense deal of labor. A county auditor should, in my opinion, be appointed, whose only business it should be to examine costs. Such a man would save his salary, and establish a good system." (House Document, No. 18, 1875, p. 28.)

At the same hearing, the district attorney for the eastern district, Mr. Sherman, testified thus: "There is great looseness in the management of taxation, allowance, and payment of fees." (House Document, No. 18, 1875, p. 31.) And in the south-eastern district Mr. French used these words: "I think the clerk of courts should be by law charged with the duty of assisting the district attorney in taxing criminal costs. Formerly they did this. In Norfolk County the clerk does assist me; in Plymouth County I employ an assistant. I cannot say there has been an entire uniformity in taxation. I relied on magistrates' taxation largely, they being officers appointed and commissioned by the governor. The extra travel on capiases I should have cut off if I had seen it. I think the cases in which it has been charged must have been liquor-seizure cases. Those cases are settled one after another in court, and I do not often tax the costs. I try a case and dispose of it, and pass the papers over to the clerk, who taxes the costs to the defendant, who pays and leaves; so that I do not see the capiases. One capias after another coming to the clerk, I can easily see how it would escape his attention that they were

all served at one time." The practice at present does not much differ from that fourteen years ago, as above testified. The business of the criminal courts has largely increased. I think not more than two or three of the present district attorneys personally examine the taxation in the lower courts. In some districts the assistant district attorneys look over the papers; in others, it is done by a clerk to the district attorney, as testified by Mr. French above; and in many counties the work is mainly done by the clerk of the courts, or some assistant in his office, in one or two instances the clerk being allowed compensation in the general bill, approved by the district attorney, for this very service. It is to be remembered, in this connection, that by law the district attorneys are compelled to tax all costs arising in criminal prosecutions in the supreme and superior courts. If it is expected of them that they shall also tax the costs sent up from the lower courts, then I think that duty should be specifically imposed upon them. After the costs are taxed, they are sent to the county treasurer in a variety of forms in the different counties, usually in a bill called the "general bill." Upon this bill the costs due to officers, cities and towns, are usually, in all counties except the four western counties, charged to the court in which the cases were tried, in substantially this form: —

POLICE COURT OF FITCHBURG.

1.	Com. *vs.* John Jones, ...	$3 60
2.	" " John Brown, ...	5 20

and so on to the end of the list, in some courts to the number of six hundred or one thousand cases. The treasurer then sends the clerks notice that he is ready to pay the aggregate amount due such a court to the clerk thereof. In most counties, the clerks then, at their own expense, go to the county seat and give their receipt for the money, and the treasurer never knows whether the money is paid to the right parties or not. In Worcester County the treasurer has sent the amounts to the clerks without their going after it. In the four western counties the clerks certify the costs to the treasurer in the same manner as in the other counties, and the treasurers pay the costs to the persons to whom

such costs are due and payable, — a method of course involving much more labor than the other. In case of trial justices the costs are certified in the same way as to clerks. Incidental expenses of the inferior courts are sent up and certified and paid in the same way. (Public Statutes, chapter 154, section 24.)

The clerks of the superior court have been accustomed to charge twenty-five cents for each case certified under the provisions of Public Statutes, chapter 199, section 4, about which I shall have something to say when I reach the "fee system." Whoever revises the costs, the clerks have been the only persons who have received any compensation for it. If the same practice had prevailed in Suffolk as in the other counties, it is easy to see that the clerk of the superior court for criminal business, under the old system, would have received from the county a salary of from ten to fifteen thousand dollars.

It is true that in Boston, where police officers are all paid a salary (and Boston is the county, so far as paying county expenses is concerned), no fees are in fact paid back as in other counties, but expenses and disbursements of officers have to be certified and paid; and, while the police court of Chelsea in no way differs from other police courts in the Commonwealth, costs from that court are not certified to the superior court. By Public Statutes, chapter 154, section 56, it is provided that the justices of the municipal court of Boston "shall meet quarterly, and as much oftener as may be necessary, to allow bills of costs, accounts, charges and expenses arising in said court, and shall certify to the public officer by whom the same are payable, such as are allowed by them." But this law is a dead letter, as I am informed. In section 43 of the chapter last named we find the following: "All the provisions of this chapter relating to police and district courts, their justices and clerks, and the rights, duties and liabilities of parties to proceedings therein, shall, as far as applicable, apply to municipal courts, their justices and clerks and the parties to proceedings therein, except as hereinafter otherwise provided."

It would seem that the provisions of law relating to costs

are equally "applicable" to all the inferior courts; and therefore it is that I say I think a stitch has been dropped in the construction of the inferior courts of Boston. I cannot find the lost ends, but am glad to find the practice; it seems so much better than that in the other counties.

Recommendations as to Certifying Costs.

If the present system of taxing costs is to continue, I recommend the adoption of the Suffolk plan in substance for all the counties. I venture the assertion, that, since the establishment of the government, there have not been errors enough corrected in the superior court to pay the costs of the revision for one single year. The method for courts having clerks would be the following: An abstract, in the nature of a pay-roll, would be made up, containing the items usually entering into a bill of costs, as, number of case, name of defendant, fees on warrant, fees on subpœna, fees on mittimus, and so on through the entire list of fees, to the total. Then add "to whom due," with a space for receipt by the parties to whom the costs are due. Then let the clerk sign and swear to the schedule as correct, and let the justice of the court certify that he has examined it and found it correct, and then send it directly to the treasurer, who, without a scrap of writing on his part, could proceed to pay from this roll, either taking receipts or sending checks under the law. (Public Statutes, chapter 23, section 13.) This plan would require a little legislation respecting the justices; but it would put upon them no more labor than was taken from them by the repeal of section 34 of chapter 154 of the Public Statutes by the establishment of this office. Let these pay-rolls be made up every three months, and then we shall have simplicity, uniformity and economy. And is there not sanction enough? The witnesses have already been paid under the law of 1888. The only fees to be certified will be due to officers, cities and towns, and to those will be added the incidental expenses of the courts. The officer taxing costs for service is sworn to its truth; he is present for examination if doubt exists in the mind of the clerk. The latter is appointed for five years, and spends his life in taxing costs, as District-Attor-

ney Marston testified, *supra*. The justice supervising holds by a life tenure; and if the costs are paid, as the statute requires, "to the person entitled thereto," there is not the slightest inducement to the clerk to overtax, or allow an officer to do that. Then there is the criminal law to punish an officer who wilfully overtaxes, and the controller to follow up, inspect the records and report infringements of the statutes. By this method the constable in Dukes County or Berkshire would be paid for his services as often as the same officer in Norfolk or Worcester. And what matters it if now and then an officer be slightly overpaid, compared with the hardship, delay and expense of the present system?

In the matter of costs before trial justices and courts having no clerks, I would have the schedules or pay-rolls made up in precisely the same manner, and forwarded every three months to the office of the district attorney, if that be the place for revision. That officer could note his corrections on the roll and forward it to the treasurer. This plan has already been substantially adopted in Essex County, and, I am informed, works with great satisfaction to all concerned. The clause of Public Statutes, chapter 217, section 6, in regard to the "general bill," as related to this system of revising costs, would need to be modified.

Costs in the Hands of the Treasurer.

In general, the treasurers are charged by law with payment of "all sums taxed for costs in criminal prosecutions, or allowed by the courts as rewards or compensations to prosecutors, to the persons entitled thereto." (Public Statutes, chapter 217, section 16.) So also as to incidentals. (Public Statutes, chapter 154, section 24.)

As has already been said, the method of certifying by the clerks of the superior court is not uniform, and the method of payment is equally lacking in uniformity. There is need of legislation upon this subject. Section 16 of chapter 217, Public Statutes, is contradictory in its first and last clauses. The practice of paying to other persons than those "entitled thereto" is forbidden in the first and apparently recognized in the last. It is claimed in some quarters that these costs accrue to the courts under the provisions of

chapter 154, section 33, of Public Statutes, and that the clerk is under that section responsible for them. But, reading section 33 in connection with 34, before its repeal, it seems to me the clerk's bond only covers the fees paid *into* the court by defendants and by parties in civil actions.

This question has been before the supreme court, and it seems to me settled conclusively in favor of the latter construction. In Burnham *vs.* Beal, 14 Allen, 217, the court say they find no provisions of law which authorize a treasurer to pay fees due to an officer to the trial justice in whose court the fees accrued, and to whom said fees were paid by the treasurer.

It is stated in the opinion that the practice may be convenient, but the treasurer takes the risk of having to pay again if the trial justice or clerk becomes insolvent, or goes to Canada with the money. An interesting discussion of this question is reported in House Document, No. 18, 1875, on page 57. The opinion of one of the trial justices for Plymouth County is so full and clear that I quote it entire.

ARGUMENT OF MR. MASON IN RELATION TO UNCLAIMED FEES.

1. The obligation to return unclaimed fees arises under sections 57, 58, chapter 120, General Statutes, which is not repealed or changed by section 8, chapter 191, Acts of 1860. The latter section is only directory to county treasurers as to the method of enforcing the provisions of the former.

2. The requirements to return fees can only apply to those fees which the law provides for justices to receive.

3. The only statute provision for trial justices to receive fees, other than their own, is that of section 6, chapter 176 of the General Statutes (section 6, chapter 217, Public Statutes), for cases where defendants sentenced by them to pay costs comply with sentence.

4. As no one claims that it is any part of the official duty of trial justices to receive the fees of officers and witnesses from county treasurers, the inquiry arises, if they do receive them, in what capacity are they received, and to whom and in what manner are they to be accounted for? In Burnham *vs.* Beal and trustee, 14 Allen, 217, the court say that sections 57, 58, chapter 120, General Statutes, apparently refer only to the cases in which costs have been originally received by the justices, and which have not been paid to the county treasurers. This case also plainly estab-

lishes that trial justices may receive such fees either as the agent of the officers and witnesses, or as the agent of the treasurer, according as the fact may be in each case. If the justice acts as the agent of the parties entitled to the fees, payment to him is payment to them so far as the public is concerned, and his accountability is solely to those for whom he acts. Fees so paid could not become forfeited to the county, and the justice could have no right, much less any duty, to return them to the treasurer.

If the justice acts as agent of the treasurer, then, although not required to make specific returns of such fees, under any law regulating the duties of trial justices, the agency would be a public one, and he would be accountable to the treasurer for any fees remaining unpaid. What the justice himself intends or undertakes to do in drawing such fees, is an important element in any given case for determining what the agency is.

It may well be that he is willing to assume, gratuitously, what serves the convenience of others, if he is thereby only subjected to keeping such accounts and vouchers as will protect him from the slight danger of a second demand for fees once paid; while he would be quite unwilling to do so, if thereby required to adopt the precision of accounts and vouchers necessary in dealing with public moneys. If the justice has uniformly and distinctly intended and undertaken to draw the fees of others only as their agent, and would not, voluntarily, have received them as a public agent, it is difficult to see any principle of law or provision of statute that makes his agency a public one against his will.

The importance of having this question settled has been twice illustrated since 1875. In the investigation of 1880, Mr. Stone, then treasurer of Middlesex County, at page 20 of Senate Document, No. 225, for 1880, testified as follows: —

The judge of the northern district court died. There were about sixteen hundred dollars of fees due him. They were made up by the administrator, and sent in and duly allowed by the district court as all costs are. Of that, twelve hundred dollars was what we call "short costs," that went into the general bill; four hundred dollars was in the bill I showed you in the first place; making, instead of twelve hundred dollars in the general bill, sixteen hundred dollars, the total amount due the magistrate.

The administrator came in to settle, and I asked him to pay over his costs; and he said he wasn't authorized to. He said it was customary for the administrator first to collect. I said the

estate was insolvent, but he did not give me any satisfaction. I said, "I cannot settle with you until you are willing to make a full settlement, and pay whatever is due the Commonwealth."

I so reported to the district attorney, and he checked the bills of costs, and made up a supplementary bill, making up the fees to each individual to whom they belonged, and ordered it paid out in that shape, and not to the estate, which it never was.

Hence, we got the receipts for that on the supplementary bill, and not on the regular bill.

And more recently, where the treasurer of Suffolk had been in the habit of paying fees that belonged to the city of Chelsea to the chief of police of Chelsea, it was found necessary to change the practice. A painful illustration of the danger of this practice has been recently given in Nantucket, to be referred to in another place. The large sums due the various cities for the services of their officers, and in a few cases to police officers themselves, ought not longer to be paid to voluntary agents. If the practice is to continue, the bonds of officers receiving the money should be made to cover it, for the public safety. I see no reason in principle why clerks of the inferior courts should receive and disburse this money, while the clerks of the superior court do not receive and disburse the fees of officers and witnesses accrued in the superior court. It is only a question of amount. By the plan recommended, but one schedule or pay-roll is to be made; and, as ninety-nine dollars in every hundred goes to the city in which the particular court is held, all of that can be paid in one check, and receipted for in one receipt. The work of treasurers will not be greatly increased.

Before leaving this subject, I must refer to one or two pleasant fictions I found in some of the counties, in the matter of taxing costs, and which I think should be forbidden. By referring to the tables in my report of 1888, it will be noticed that the clerks, justices and trial justices in Berkshire and Franklin counties did not account for any criminal costs as having been received from the county; while the same officers in Hampden and Hampshire counties, by the same tables, appear to have received large sums, — in Hampden, $5,046.21 in all the courts; in Hampshire,

$1,931.81. I stated that in the four western counties the practice is uniform for the treasurers to pay costs to the parties entitled thereto; and that is true. These large sums in Hampden and Hampshire represent no funds received or paid. It comes in this way: the clerks in lower courts certify to the superior court the court or justice fees accrued in unpaid cases, a labor wholly unnecessary. These are certified from superior court to county treasurers, who draw checks payable to clerks of the inferior courts, who in turn indorse them back to the treasurers, without passing any money at all. The result is much work for clerks and treasurers, an apparent large income of the lower courts; and, in fact, counties have the credit or discredit of raising and disbursing large sums of money which they do not raise or disburse. This fiction or farce of finance has disappeared in Hampden and Hampshire counties. Another fiction exists in Middlesex, but largely reduced in proportions. In this county the clerk of the superior court certifies to the treasurer the "court or justice fees" in grand jury and appeal cases from the inferior courts, and the treasurer goes through the farce of turning these over and receiving them back, as formerly in Hampden and Hampshire as above stated. It should be stated that "court or justice fees" go to the county, except in cases before trial justices. If this custom has arisen from the fact that trial justices have to certify their *court* or *justice* fees in order to obtain any compensation for their services, and the Statutes say police, district, and municipal courts shall conform so far as practicable to the methods of trial justices, then we have an illustration of the truth that it is time for the old phrase to be modified. (Public Statutes, chapter 154, section 37.)

The inferior courts of Middlesex, by the tables annexed, will show an apparent income, from which courts in other counties will suffer by comparison. An instance of what took place two years ago will illustrate fully. Two clerks of police courts applied for an increase of salary, — one in Middlesex, the other in another county. The real business of the two courts was substantially equal. But the Middlesex clerk showed more income in his court than the other, and got his salary raised; while the other clerk had

leave to withdraw. The whole excess of the one over the other court was from this padding. I have protested against its continuance, but without result. Nothing, as it seems to me, should be certified to the treasurer for payment unless the same is due and payable. No entry should be made on a cash book, unless it represents cash or its equivalent, or to correct an error on the other side.

The Clerks of Courts and the Fee System.

Reference is made, of course, to the clerks of the supreme judicial and the superior courts. The fee system, as a basis of compensation for these clerks, having been, as I supposed, abolished, I shall not take much time or space to discuss it. In the hope, however, that a brief explanation of what I found may be of service in doing away with every remaining vestige of that system, I will briefly refer to a few facts which will illustrate the whole question. It will serve no useful purpose to inquire into the origin of the system. It is enough to say it has existed in this Commonwealth from the origin of the government. As I found it, there was no principle or thread running through it, no ancient usage, not even "the custom of the country." The custom of the county seemed to be the real basis of the operation. It rested in the air, — the centre and both flanks. I am persuaded it was as unsatisfactory to the clerks as to everybody else. But it came to them as an inheritance, and the fear that liberal salaries would not be given to them if the system were abolished, caused them to cling to it with the greatest tenacity. Owing to the difference in the size of the counties, and the magnitude of the business done in the courts, uniformity of taxation was impossible. A rate of charges in a small county might produce a fair salary, while the same rate in a large county would yield an extravagant and unreasonable compensation. Not one-half the fees known to the profession were fixed by statute. A gentleman now in public life, who was formerly clerk of courts in one of the counties, told me he could not speak for others, but, as for himself, when clerk, the limit to his charging was his conscience. This being so, it is easy to see why abuses would surely creep into the system. It was based on the theory that the

clerk could do nothing without a fee; and I found that not much had been abated from the vigor and the rigor of that ancient maxim. So far was that principle carried, that some of the clerks did not recognize the right of the State to call upon them for any service without granting compensation therefor. This is illustrated in the returns of divorce statistics to the Secretary of State, and of criminal statistics to the Commissioners of Prisons. For making these returns in many of the counties, a charge was made and submitted to the county commissioners for approval. When they began to reject these claims, the clerks would insert them in the "general bill," and in some of the counties the district attorney would approve them, and then the county commissioners would examine and allow the accounts of the treasurers, although the bills they had rejected had been paid by the county; as if a bill bad at its inception became good after having been approved by some authority, whether competent or not. The fees of the clerks ranged all the way from five cents to seventy-five dollars. It was five cents for a writ, six cents for a venire, eight cents for examining "any other account," ten cents for a subpœna, twelve cents for a continuance, fifteen cents for "copy of bill," twenty cents for recording verdict, twenty-five cents for certificate of costs to treasurer, thirty cents for examining grand jurors' account, forty cents for a term fee, fifty cents for taxing and execution, and so on to the end of the chapter. It must have taken the book-keeper in the large counties substantially all the time to keep the account personal to the clerk. It did not take me long to ascertain that the obstruction to all reform in the method of doing county business and keeping accounts, and especially in the matter of certifying and paying criminal costs, was the fee system. It was a premium on delay. The clerk received twelve cents for continuing a criminal case, and forty cents for a civil. It was a premium on a lumbered-up docket, and on the longest way of doing things. The clerks had twenty-five cents in many counties for each order drawn by the commissioners on the treasury. Therefore, it was for the clerk's interest to draw as many separate orders as possible, when one order would answer for all bills approved at one time by the commissioners, no

matter how numerous they were. The attorney-general in 1880 decided that there was no law for this fee, but the matter was in the discretion of the commissioners. The sum charged for this work varied from twenty-five cents for each order, to nothing whatever, except a small charge for recording the roll; while in Middlesex a lump sum was charged, as fifty dollars for the work, in proportion to its amount. I caused an estimate to be made in Middlesex of the number of orders passed by the commissioners in one year, and it approximated thirty-two hundred, which, at twenty-five cents each, would yield the snug income of eight hundred dollars. I know of no law that requires the clerk of the commissioners to examine bills passed by them, and it seems to me the fee for recording the roll was all the law permitted. It is easy to see why the "pay-roll system," so popular everywhere, could not be introduced in some of the counties.

To my great surprise, I ascertained that in all the counties, except Essex, Middlesex, Norfolk and Bristol, all entries and term fees in the county commissioners' courts were charged to the counties; and so, the longer the docket in that court, the better for the clerk. In Bristol no term fee was charged. There being no defendants in most matters in those courts, it is apparent why the dockets were encumbered with a mess of old stuff of little merit. Those familiar with the practice know that the railroad companies are the most frequent petitioners in the county commissioners' court; and why the county should be charged with the payment of costs and term fees for these corporations, I could not understand. If that court was ever the poor man's court, it is not so now.

I will mention a few of the "key fees," and show the method of their collection, the whole thing revealing the most wonderful system of finance on record in any country. The meanest and at the same time the most profitable fee, apparently, was the fee of twelve cents for continuance, in a criminal case. There was no such bonanza to a clerk as an old docket of continued cases. A term having come to an end, how should the clerk collect the twelve cents due him in each case carried over? By Public Statutes, chapter 199,

section 4, the clerk was entitled to twenty-five cents "for a certificate to the county treasurer of the costs in each criminal case." I apprehend this was intended to mean at the end of the case, or at its final disposition. But, in all but four or five counties, the clerks took a different view of it, and proceeded to collect their fees in "the manner pointed out by the statute."

Plymouth County furnished the most unique example of finance I ever saw. The clerk charged up his continuances at twelve cents each, then added twenty-five cents for the certificate to the treasurer, fifteen cents for copy of bill, and forty cents for recording; or, stating it in another form, it was .12+.25+.15+.40=92 cents, for each continuance. That is to say, in order to collect twelve cents due from the county, the clerk put eighty cents more with it. And this has been going on from time immemorial. In the counties of the southern district the fees in such cases were fifty-two cents; in Norfolk, fifty-seven cents; while in Essex and Middlesex, only twenty-five cents were put with the twelve cents, making thirty-seven cents on each continuance, Middlesex having adopted this plan recently, apparently in order to keep up with Essex. The clerks justify by saying the district attorneys tax the costs in each case, and they collect only what is duly approved. It is of course a travesty on finance, to say nothing of justice. By reference to the tables, it will appear that very large sums were collected in Essex during the last two or three years. This was because, when the present clerk came to the office, he found himself in possession of a magnificent legacy, in the shape of thirteen hundred or fourteen hundred cases on his criminal docket. I counted ten hundred and thirty vouchers at one term, at thirty-seven cents each, amounting to the sum of three hundred and eighty-one dollars. And the work done to continue those cases, as I understand it, is to write five lines at the end of the docket, saying that all cases not otherwise disposed of are continued; or, at most, writing the letter "C" under each case, and bringing all forward on new docket at next term. In the superior court for criminal business in Suffolk, and in Worcester, Hampden and Berkshire, and perhaps other counties, continuances were taxed

at twelve cents, and multiplied by the number of the same; and this seemed the most business-like, if not strictly legal, method of collecting this interesting little fee. In Plymouth and in some of the other counties, as if to crown the work with ostensible high authority, the clerk, in attesting the copy to draw ninety-two cents, would use the name of the court, thus: "Examined and allowed by the court, W. H. W., clerk." Here it seems to me is an abuse that ought to be stopped. Of course no judge ever saw or knew of any such proceedings. The judges at the close of the term usually approve nothing but the sheriff's bill, and the clerk's for incidentals, or something of that kind. It is high time the phrase, "examined and allowed by the court," where the court has nothing to do with the matter, was buried with John Doe and Richard Roe. I do not charge illegality in the above method of collecting fees. I say it is extraordinary, and, carried out to results, seems almost monstrous. For instance, on one docket I saw an entry made in 1878, there being three terms a year. If a case were ended in ten years in Suffolk County, where twelve terms are held, and the costs taxed to a defendant, would the clerk charge him with one hundred and ten dollars and forty cents for continuances? In old times, it was held extortion to demand a fee before it was due. But in Plymouth a dollar has been charged and collected for recording each criminal case, whereas, when I first went there, not a word had been recorded in superior court records since 1873, and the county has recently been paying extra clerks for doing this work for which it had already paid.

I will name only one or two other peculiar fees. In Worcester and one or two other counties, under the provision of law allowing ten cents "for the entry of an appearance in a criminal case," the clerk charged ten cents for entry of the appearance of defendant, and ten cents more for entry of appearance of the Commonwealth; and this is defended as the law. In practice, the district attorney, I believe, never enters any appearance. At least, I never heard a defendant make a motion to "non-suit" the government because no appearance had been entered in its behalf. The

indictment would seem to be sufficient appearance of the government.

Another kindred freak was the taxing of an appearance in cases where "no bills" were found by the grand jury. Again, in Hampshire and Franklin, notice of rescript received was charged to the county, ethics probably preventing a charge to both parties interested in the rescript. In Bristol the clerk charges for recording or certifying grand jurors' roll, and then twenty-five cents for each name on the roll. In Worcester, since the repeal of the fee system for clerks, the clerk has charged and collected from the county thirty cents for each name on the grand jury roll, and in doing it procured the approving signature of a justice of the superior court, this justice, of course, signing inadvertently. The Statute, chapter 199, section 4, reads as follows: "Examining and casting the grand jurors' accounts and order thereon, thirty cents." In Hampshire the clerk formerly charged thirty cents for the grand jury roll of twenty-three men, as allowed by statute, and then, on traverse jury roll, would charge eight cents for each name. In Bristol twenty-five cents is charged for each man on traverse or grand jury roll. Analogies are never followed when they lead to lower fees. In Bristol the unique fee of seventy-five cents is charged for recording an adjournment of the county commissioners, — a fee found nowhere else.

But I will no farther pursue the ramifications of this venerable method, which, when threatened with analysis and exposure, toppled to its fall, never in my judgment to rise again in this Commonwealth. I regard its abolition as the best piece of legislation since the Practice Act. I ought to have stated before that the clerks never drew fees from the county treasury without those fees having been first approved. The auditors were the judges of the supreme and superior courts, the district attorneys, and the county commissioners.

The law of 1888, chapter 257, giving the clerks fixed salaries, and establishing the fee to be taxed in civil (in part) and in criminal business, I believe is almost universally acceptable. Nothing has been more annoying to the clerks than the collection of the forty-cent term fee which accrued at every sitting of the court. And these fees were equally

annoying to the members of the bar. When paid to the clerks from time to time, on bills including a great number of items, attorneys did not at once repair to their books and charge their clients for these little fees; and in many instances attorneys really paid them out of their own pockets. Now, when an entry is made, three dollars must accompany it, and this ends the financial part of the case. When the litigation is finished, and the "fruit" is called for, no two-penny tax of fifty cents for an execution is exacted. The law is wholesome in a variety of ways. The fees of the offices in civil matters will be increased, because all cases now paying three dollars at the entry will yield more money than entries gave before, so many were entered and disposed of at entry term yielding only one dollar and forty cents in each case. At the same time, the law will prevent entries of frivolous cases, and drive many small matters into the inferior courts, where they properly belong. At present, entries are not made in the court of the county commissioners unless a *bona fide* case has arisen, in the opinion of some petitioner; and there is a considerable income from this court, where before there was nothing. The fear expressed at first, that the new practice might clog the dockets, has not been realized. It is now for the interest of the clerks to have short dockets, where as formerly their shekels were found in long ones. It is impossible to say the clerks have nothing to do with the length of the dockets.

Clerks' Term Fees in Old Cases.

The collection of the clerks' term fee in cases entered prior to July 1, when the new law took effect, still continues, and should be continued till the cases are all disposed of, since the income derived from this source goes wholly to the counties. In Suffolk, at the end of the year 1888, there were 3,900 cases on the dockets of the superior court for civil business, each yielding to the county forty cents for each sitting of the court.

Old Charges, or Outstanding Fees.

In all the counties there are on the books many charges which the clerks have not been able to collect. In the small

counties, where the fees have not amounted to the salary fixed by law (Public Statutes, chapter 159, section 30), the clerks are charged with all the fees which accrued, whether collected or not; a hardship, as must be obvious, when compared with the large counties, where the fees greatly exceeded in amount the salary as fixed by law. And here may be given a wonderful illustration of the system of fees as a basis for compensation. For instance, in Essex the clerk's salary was $2,000, and half the excess above that sum. Of course the salary depended upon the excess; and hence the tendency, too strong to be resisted in some counties, to tack on naturalization fees, fees allowed for dockets and trial lists, and for printing law cases, which did not belong to the clerks in any event, to swell the excess. In Essex last year the clerk received from the county for fees in criminal matters, and for the other work done for commissioners and for county, the sum of $5,240. This, for instance, being taken for the whole excess above $2,000, half that sum would enter into the clerk's compensation; a system of compounding, that, carried a little farther, would be ruinous. It should be stated that a portion of the clerk's fees in criminal cases is paid back to the county through the sheriff and master of the jail or house of correction, as fines and costs are paid to those officers. But, to return to the outstanding fees: whether the clerks were right or not, in doing a credit business with attorneys and parties, they how have a large number of outstanding bills which are difficult of collection. They have notice to prove in insolvency in many cases, and doubtless much of the stuff on their books is worthless. Indeed, some of the clerks say they have nothing left which they think can be collected by any process known to the law. There is some doubt as to who should be the plaintiff in a suit to collect a bill for fees. One clerk, when I asked him how he would declare, answered, facetiously, that he thought he should join the county with himself as co-plaintiffs. It might be well for the Legislature to direct the clerks to send in a detailed statement of these outstanding liabilities, so that, if possible, some means may be devised to collect these bills. Half of them at least are due the counties, and therefore it seems worthy of consideration.

Sheriffs and Masters of Jails and Houses of Correction.

As a general thing, the accounts of these officers have been accurately kept, and the funds received by them properly accounted for. The books of masters of houses of correction approach uniformity, and before long will be made uniform. The books of sheriffs are not so satisfactory. The office of sheriff has not the appearance of permanence, like that of other county offices. In some of the court houses there is a room called the sheriff's office; but he is there only occasionally, often not residing at the county seat. The books he keeps are deemed his own, and when he retires he takes the books with him, as a rule. It is for the Legislature to say whether a different rule shall be established. One thing I am persuaded should be done at once; namely, that sheriffs and masters of houses of correction should be required to deposit public funds, if they deposit them at all, in their name as trustee, and not mingle public and private funds, indiscriminately. Many of them deposit now properly, but many do not; and this vicious habit is practised by officers, in grade from the trial justice to the highest county officer except treasurers. I have warned and advised against it, but in many cases without avail. In Norfolk County, the sheriff, who is as honest a man as there is in this world, I have no doubt, is also master of the house of correction, buys supplies for the same, and pays for them out of his own pocket; draws from the treasurer the pay for his deputy sheriffs, and keeps only a personal bank book in a national bank. When I asked to see his bank book, the answer was, that it would not help me much, and so it proved. By section 3 of chapter 438, Acts of 1887, the controller is compelled "to ascertain the actual amount of cash or money on hand in any of the aforesaid departments or with any of said officers." This is the most disagreeable part of my duty; but, as it is the most effectual part, it cannot be omitted with fidelity to the public. Where I find the officer has only a private bank book, I do not verify it, because any amount of funds in a bank is no evidence that any part of it is trust funds. In one case I examined the books of a master of a house of correction, and

called for a certain amount of money on hand. This was not produced, but the statement was made that his bank book was at the bank. I sent for a statement of the account of the master, but was told he had funds there as sheriff, but not as master. In another case, one of my clerks, in examining the books of a district court, called for the balance, when the clerk went out, and, after considerable delay, returned with a private bank book, in which had been entered that very afternoon the amount required. In the case of the clerks of the higher courts, there being a doubt as to the ownership of the fees upon which salary was based, there was more justification for not keeping a book as trustee. But, now that all fees received are trust funds, there is no excuse for depositing in their own names. At this late day it would seem hardly necessary to make a statute covering this matter, with a penalty for non-compliance; but I am sure it is. If a law be passed compelling such deposit, it may be that such deposit ought to be an acquittance of the officer making the deposit, in case of the insolvency of the bank or trust company; especially if the deposit be made in a bank or trust company approved by the treasurer of the county where the officer served. Treasurers are compelled to deposit in a national bank. (Public Statutes, chapter 23, section 18.)

Time of Making Reports by Sheriffs.

By the provisions of Public Statutes, chapter 217, section 9, the sheriff is bound to pay over to the treasurer, within one month from the receipt thereof, all fines, costs and forfeitures due, imposed or awarded in the supreme or superior courts, and all sums found due on forfeited recognizances. But the law does not appear to require him to accompany the payment with any account or detailed statement whatever. Then, by section 13 of same chapter, he is on the first days of January and July to render an account on oath of all money received during the last six months. It seems to me these two sections may well be merged in one, and have the accounts accompany the money. And it might be convenient to pay over at the end of a criminal sitting. A literal compliance with the law as it now stands would seem to require the

sheriff to pay over in driblets, if the sitting should happen to extend beyond a month. By section 8 of same chapter, the clerk of the courts is required, "at the end of every term, or as soon thereafter as may be," to send to the treasurer of the county "certificates of all fines imposed by the respective courts." It is probably an oversight that the words "and costs" are omitted in that statute, as the costs paid to the sheriff or master often exceed the fines. This omission should be cured by statute. It is of course intended as a check when the sheriff sends in his money and his detailed statement.

By section 12 of same chapter, payment to deputy sheriff is deemed payment to sheriff; but no provision is made as to whom the deputy shall pay, or whether he shall make a return or file an account.

I take the liberty to point out, in House Document No. 2 of this year, in the returns of sheriffs, that, in four counties at least, the amount of money received as fines, costs and forfeitures, is not apparently entered upon the schedules. The question of forfeitures I shall discuss more at length when I come to the vouchers in the treasuries.

The Treasurers.

I have personally visited every county, and examined the books and vouchers of the treasurers, paying special attention to the variety of ways and means of doing substantially the same thing, with the intention of reducing the methods of book-keeping to one system, if possible or prudent. I scarcely found two treasurers doing the same thing in the same way. As the Commissioners of Savings Banks for eight years had the same authority that I have over the question of book-keeping in these offices, and did not order a uniform system, I was put on my guard against any hasty action, and can now see the wisdom of such a course. Many of the treasurers are of very great age, have been long in office, have surrounded themselves with books and memoranda which they consider checks upon themselves and safeguards to the public, and they would find it exceedingly hard to make any radical change in their methods of keeping accounts. Since accuracy is the main thing, — and I find that

in all these offices, — I shall be slow to make changes arbitrarily. By conference, and general agreement, I hope sooner or later to establish a simple and uniform method of keeping the books in these great offices.

At present, the methods vary, somewhat as the size and magnitude of business vary, in the different counties. One veteran, who has kept his debits on the right hand page of his cash book, and his credits on the left, thought it would "break him up" to transpose his pages, so as to seem to receive his money before spending it; and he was not disturbed, his methods appearing to be entirely accurate. In the small counties, a single cash book, with a separate statement of the "dog fund," is the only book required, except the ledger, to indicate the classifications required by the prison commissioners and by this office. I apprehend the Legislature intended, by section 11 of chapter 23 of the Public Statutes, to enact that the treasurer of a county should keep *one cash book*, which shall contain "a full and accurate account, stating the time when, the person from whom, and account on which, money is received; and in like manner the time when, the person to whom, and the account on which, payments are made." If that section could be recast and brought into the form above indicated, it would soon solve the problem of a uniform system of keeping books in the treasuries. In that event, the duplicate receipt book required by Public Statutes, chapter 23, section 12, the cash book or journal, and the ledger, would be all the books required. And even the ledger may be dispensed with, if the cash book be supplied with columns enough to meet all the wants of business. In Middlesex and Worcester, and now in Essex, the treasurers have adopted cash books with receipts and expenditures appropriately classified; and their example is commended to other counties, it being evident that these classified abstracts, daily, weekly or monthly, if desired, must be a great convenience, and avoid the necessity of keeping a great number of auxiliary books. The treasurers all evince a disposition to adopt the best system, and many improvements have already been made. The laws of 1888, fixing salaries for the clerks of courts, and compelling the payment of witnesses in the inferior courts and be-

fore trial justices, and the further reform anticipated, in the method of certifying and paying costs not paid by defendants in these same inferior tribunals, will very much simplify the work of treasurers. The pay-roll now so popular in some counties, in cities and towns, will inevitably be adopted in all the counties, to save labor of clerks, county commissioners, treasurers, and all concerned in the transaction of county business.

Result of Examinations.

Conceding the legality of the vouchers presented by the different treasurers, I found no substantial errors in these offices. Slight errors I did find in two or three instances, but only such as are incident to humanity, and no suspicion of intentional wrong. I do not mean to say that I found all the accounts legally vouched, but in form, and apparently, the vouchers were all in place, and the balances called for by the books accurately accounted for. One word as to the legality of the vouchers. About the time of my entering upon the duties of this office, I had a conversation with one of the learned judges of probate, who of course is one of the county examiners in his county, in regard to the vouchers in the treasuries. He told me he supposed I would go deeper than the board of examiners did, and examine the legality of the vouchers; whereas the board confined themselves generally to seeing that the vouchers were in proper form and apparently approved by the proper officers, that the footings were right, and the balances duly accounted for.

This remark was a source of great relief to me, because I soon found I did not agree with some of the boards of examiners in relation to certain vouchers and methods of doing business. I will call specific attention to the cases where I have considered the vouchers defective, and where the correction has not been made at my suggestion. The correction has not been made, because the officer either did not agree with me in my view of law, or because he was content to rest upon the approbation of the county commissioners and of the board of examiners. By the provisions of Public Statutes, chapter 23, section 7, "the bills or evi-

dences of county indebtedness, for which payment is ordered, shall be delivered with the order to the treasurer." This is not done in all cases. For instance: bills of incidental expense of courts, certified under section 24, chapter 154, Public Statutes; bills of the supreme and superior courts, allowed under section 23, chapter 153; bills of auditors, under section 55, chapter 159; bills of the clerks in certain cases, are generally retained in the superior court, and an order drawn by the clerk upon the treasurer for the amount due the different persons concerned. I do not think this is right. In examining the treasurers' accounts, I ought not to be compelled to go to the clerk's office and see if a judge approved an auditor's bill. Section 8, chapter 23, Public Statutes, would seem to mark out the duty of the treasurer in such cases. That section provides that "no payment shall be made out of a county treasury unless the bill or account rendered is accompanied by vouchers, in which are stated in detail the items of each bill or account; nor unless all such vouchers conform and sustain such bill or account." The treasurer should refuse payment until the vouchers are forthcoming. It seems to me these bills are in no just sense a part of the records of the court, but belong with the treasury. In Middlesex and Bristol I found them there, and in those two counties were the bills of "short costs," so called, that go up from the inferior courts. I believe the treasurers generally take my view of the law. If they would resist payment, and let parties sue, that would test the legality of the proceedings. The sum annually paid upon these particular bills is very large. The incidental bills from the inferior courts, it seems to me might all go straight to the county commissioners for allowance. The commissioners can build and furnish a court house, but cannot furnish a clerk of a police court with a bundle of lead-pencils. We have seen that in some of the counties the dealer in lead-pencils must wait six months for his pay. I apprehend the abolition of the fee system as compensation for clerks will regulate this matter sooner or later. I also found, in the treasury of Bristol, vouchers signed with the *fac simile* stamp of the clerk, — a most dangerous proceeding, it would seem. I called the clerk's attention to this, and

he replied that in his absence he allowed the *fac simile* to be used, but has now discontinued the practice. I examined the records of the commissioners, and found the bills duly recorded under the clerk's own hand. The defect was in certifying to the treasurer. The bills were also signed by the chairman of the commissioners; but I do not understand that adds anything to their legal validity. The supreme court has decided that the clerk, and not the chairman of the commissioners, is the only proper person to attest records; and I apprehend the same rule applies to bills. (Rich *vs.* Lancaster Railroad, 114 Mass. 514.)

Again, in Bristol, I found a peculiar way of paying the jurors, which I cannot sanction. When the pay-roll is complete and duly certified, the treasurer sends it and the jury to a national bank in Taunton, Fall River or New Bedford; the teller of the bank pays the jurors, without taking any receipt from them, and then certifies on the jury roll or otherwise that he has paid the jury; and I am asked to consider that evidence of payment. Because this has gone on for years, makes no difference. The treasurer of Bristol does a prodigious amount of work, and in my judgment can pay a jury as quickly as the ordinary bank teller. At any rate, I do not think there is any legal evidence that he has paid a jury since he adopted this rule.

In Norfolk the treasurer has paid dog damages in this way: the amount due to parties residing in Quincy, for instance, would be sent in one check to the chairman of the selectmen of that town; and the return of that check, duly indorsed by said chairman, was offered to me as evidence of payment of money to parties in whose favor dog damages had been assessed. This check seems to me of no importance. The law is explicit, that money shall be paid to the parties to whom it is due. I do not see how I can take as evidence of payment anything but the receipt of the party; his order to pay to some third party; the check of the treasurer, payable to the order of the party, duly indorsed; or the judgment of a court in trustee process. The receipt of the sheriff for money due his deputies is equally objectionable, and so is the widely extended habit of paying to one for the benefit of another. The receipt of the right party should be

obtained, or his request filed with the treasurer. The payment by check is made a remedy against holding money by a treasurer more than ten days. His safety is in the law; mine is there also.

In Norfolk, the sheriff, who is also master of the house of correction, pays out of his own pocket for supplies to the jail and house of correction. This is clearly illegal, and ought to be stopped. The statute forbids the treasurer to pay any money to the commissioners to be by them disbursed in behalf of the county. (Public Statutes, chapter 23, section 6.) If the commissioners, having charge of furnishing the supplies for jail, cannot advance county money for supplies, for a greater reason the keeper of the jail should not be allowed to advance money and charge the county for it. If the advantage of paying cash is so great, the Legislature cannot fail to recognize that fact.

The method of doing this business at Dedham has been as follows: the sheriff buys, and pays with his own money, and takes the receipt of parties with whom he deals, on bills made to him individually. Then, at some stated time, he settles with the county by presenting a bill in his own name for the full amount of the separate receipts obtained as above stated, and offers these receipts as his vouchers. The sheriff having already paid for the supplies, the commissioners must either cut down the sheriff, or abdicate their function provided in Public Statutes, chapter 220, section 54, which in effect is, that, before payment for supplies, the jailer's account shall be settled and allowed by the commissioners. The sheriff and the commissioners are both placed in a false position. The chairman of the commissioners of Norfolk signifies his willingness to discontinue the practice. The credit of the county is good anywhere.

Another doubtful voucher is the one relating to payment of special justices of the inferior courts, particularly in inquests. I find vouchers amounting to thousands of dollars, paid in favor of special justices who hold inquests; and the only authority apparent is, that they attach to their names the words, "special justice" of such a court. And, indeed, in some cases no title is added at all, and I have to inquire who the party is that is holding an inquest. If I am right

in the law, the special justice can hold an inquest only in the absence or disability or at the request of a standing justice; and that fact must appear on the record. (Public Statutes, chapter 154, section 25. Com. *vs.* McCarty, 14 Gray, 18. Com. *vs.* Fitzgerald, 14 Gray, 14. Com. *vs.* Fay, 126 Mass. 235. Com. *vs.* Hawkes, 123 Mass. 529. Dyke *vs.* Story, 7 Allen, 351.)

I am of the opinion, that, if the Legislature would enact specifically that every special justice holding an inquest shall add to the record of the case the reason of his sitting, the counties would have less fees to pay in this direction. Then the treasurers would know whether a voucher was good or not.

In this connection may be considered the Act of 1885, chapter 40. If special justices can sit only in place of the standing justice, or at his request, why should the special justice not be compelled to sit for the same fees which would accrue to the standing justice? If the special justice act in the absence of the standing justice (the standing justice being absent more than thirty days in one year), the compensation must come out of the standing justice. There seems to be an inconsistency in the law.

Then another question arises, upon the vouchers, which the treasurers have asked me to settle, or refer to the Legislature; to wit, How many days make a year, in one of the inferior courts? The law now provides, as above suggested, that, if the standing justice be absent more than thirty days, he shall pay the special justice for service at the same rate as he himself receives, — not less than $2.50 per diem. There is a dispute as to whether the salary of the justice should be divided by 365, or a less number, as the number after deducting from 365 the Sundays and legal holidays. Of course, the smaller the divisor, the greater the quotient. The question is not free from difficulty, as the courts are always open for issuing warrants; and in some courts the justice hears the complainants, and directs whether a warrant shall issue or not. The question might turn on the facts in each case. If I were to say that a special justice now deceased told me that he obtained the opinion of an attorney-general now deceased, to the effect that 307 days make a

year in a police court, my testimony would probably be rejected. I do think there should be some uniform voucher in this matter. Whether the clerk should certify to the number of days served by a special justice, or whether the affidavit of the special justice should be taken, or whether the standing justice should make some certificate, is the question. In Hampshire County the justice of the district court makes a certificate to the treasurer, as to the number of days when two courts are held under the statute.

Kindred to this voucher is the need of one in cases arising under the law of 1888, giving the clerks of the inferior courts a vacation of fourteen days. (Chapter 352.) The clerk *pro tem* might be required to give an affidavit, to be approved by the justice holding the court.

Vouchers in Criminal Cases.

The principal voucher I would criticise in criminal business is that of the certificate for the payment of witnesses in the courts; and the defect, with a few exceptions, a year ago, ran through all the courts. The methods of certifying and paying the witnesses in the superior court vary as much as the forms in criminal process varied before the attempt at uniformity. The one thing that seems to me to be material, and which is so generally wanting, is the certificate of the witness himself. In Public Statutes, chapter 199, section 14, is this clause, which I think applies in all cases, civil or criminal: "And each witness shall certify in writing the amount of his travel and attendance." And in section 41 of the same chapter it is provided that "no sheriff, deputy sheriff or other officer, taking the certificates of witnesses in criminal cases, shall purchase or discount or have any interest in orders drawn or demands upon the treasury by such witnesses;" clearly implying that in criminal cases the witnesses themselves shall certify. It is held by the supreme court that the certificate of a witness *prima facie* entitles him to his pay. (Barber *vs.* Parsons, 145 Mass. 203; Miller *vs.* Lyon, 6 Allen, 514.) If this be material, the omission can easily be supplied. The clerks and district attorneys carefully supervise this matter of witnesses, and weed out a good many supernumerary and professional witnesses, who crowd them-

selves into as many cases as possible. The omission, if it be one, has been by inadvertence, I apprehend, and perhaps because very many witnesses cannot sign their own names. The treasurers, clerks and district attorneys by agreement can readily adopt the best system, which ought to be uniform in all courts. The double certificate, "we have attended," etc., "and have received our fees," would seem to cover the case. The treasurers have the witnesses' receipts, and probably no harm has been done. At my first visit in 1887 to the north-western district, I found the witnesses in the superior court for criminal business were not paid at all at the time of the trial. The treasurer of Franklin told me of the hardship he had been cognizant of, by reason of the non-payment of witnesses, but did not seem to be very clear as to where the responsibility for their non-payment lay. In Hampshire the practice now is to pay the witnesses as in other counties. In Franklin there has been no change, and this great wrong continues. While at Greenfield, in January last, and while examining the books of the county treasurer, a man came in from Whately and called for his witness fees, which were paid to him, for himself, his wife, and two other witnesses. I asked him where he testified, before what court, and in what cases. He answered before the grand jury at the last term. I asked him why he did not get his pay, and he answered that he did not know; that he signed some certificate at the time of the trial, but did not know what. The citizens of Franklin have complained of this great hardship, but not in the proper quarter, I apprehend. The clerk tells me that hereafter he will do what he can towards securing payment to the witnesses, as in all the other counties. Nothing will more simplify the treasurers' accounts than to have the witnesses paid at the time they testify. In Hampshire and Franklin the treasurers do not have their offices in the court house, although offices are there provided for them. It might be a good regulation to require the treasurers to be in the court house while the grand jury is there, and during the criminal trials of the court. Another doubtful voucher on the criminal side is that of a fee for clerk to the district attorney. By Public Statutes, chapter 17, section 16, it is provided "that, in districts where there is no assistant dis-

trict attorney, the court may allow such sum as it may deem reasonable for the services of a clerk to aid the district attorney in the transaction of the criminal business of the district." I do not find the vouchers approved by the court, but by the district attorney in the general bill. This may be right, but I do not so understand the law. Still another source of income to the counties, in regard to which the vouchers show great diversity of practice, is that from forfeited recognizances. I find, in some counties, not a dollar has been paid in from this source for years; in other counties, small sums are paid in from time to time, as if "straw bail" had been taken, or else parties had been let off on extremely favorable terms. The law appears to be very strict upon this subject. Public Statutes, chapter 217, section 9, has already been quoted. That section seems to me almost impossible of enforcement. It provides (section 12) that the sheriff or deputy sheriff, alone, shall be authorized to receive money due from forfeited recognizances, which amount shall be certified by the clerks of the courts. How and when is it to be certified? I find money for forfeited recognizances paid in by the sheriff, by the deputy sheriff, by the party, and by the party's attorney. There is no certification except when money is paid to the sheriff, and frequently there is none then. The action upon a recognizance seems to be civil in its nature, the district attorney is counsel for the plaintiff, and the practice appears to be, so far as I can gather from the vouchers in the treasurers' offices, that the district attorney has the same control over the action that counsel has in ordinary civil cases; to wit, power to compromise or remit a portion of judgment, if judgment has been obtained. The provisions of Public Statutes, chapter 17, section 20, clearly forbid a district attorney to discontinue an action upon a recognizance without the approval of the court, or a certificate from the sheriff that full payment has been made of the amount of the recognizance and costs. That is to say, the district attorney's discretion is taken away in the single instance of a case pending, but does not forbid compromise before or after action is brought. This law is akin to chapter 359, Acts of 1885, which forbids a district attorney to place a case on file unless the presiding judge will file a cer-

tificate that the interests of public justice require the filing of the case. The practice would seem to determine what is best in this matter. If the district attorney can compromise, before or after judgment, why should he not receive the money, and account for it to the treasurer of the county? He cannot find the sheriff, perhaps, nor the treasurer, and is not allowed to receive the money himself. I found in Hampden County the clerk made out a list of executions on forfeited recognizances, and forwarded the same to the treasurer. There were on this list five cases against one party who had been defaulted, — the five executions, with costs, amounting to $1,100 and more. An order came from the district attorney to settle for $60 on each case; and $300 were paid in, the county apparently losing $800. The district attorney probably had satisfactory reasons for settling the claims of the county, but I think the county may well know the reason of such settlement. I recommend that the clerk of the courts for criminal business in Suffolk County, and the clerks of the courts in other counties, at the end of each year, be required to make a tabulated statement of all forfeited recognizances during the year, with the disposition of the same; the table to include name of bail commissioner or person taking the recognizance, so that, if straw bail is taken, that fact will be known; and have the treasurer publish this table in his annual statement, provided for in Public Statutes, chapter 23, section 28, hereafter to be referred to more at length. I doubt the wisdom of taking away the discretion of the district attorney, but do think it will be for the public advantage to know more fully how that discretion is exercised. It is well known that in liquor prosecutions, in lottery or gambling cases, and in cases of keeping houses of ill fame, the defendants prefer to be defaulted, and then fight for reduction of terms on recognizances. I believe here is a class of county securities that will bear enforcement to the extent of the law.

Duplicate Receipts.

Section 12 of chapter 23, Public Statutes, provides that "all receipts for money paid to a county treasurer shall be in duplicate, and one copy shall be given to the party making the payment and one to the county clerk." This pro-

vision of law is a dead letter in Middlesex, and practically so in many other counties; as, on inquiry at the clerk's office for the treasurer's duplicate receipts, they could not be found. Curiously enough, when this law was first reported to the Legislature of 1880, the requirement was of duplicate receipts for payments by the treasurer; and I found such duplicates on my first visit to the county of Dukes County. The law seems to me of great importance, and should be rigidly enforced. It is true we have in this Commonwealth no such officer as "county clerk," by that name. It is equally true that the Legislature intended the clerk of the courts by the words "county clerk." It may be well to change the phraseology now, or, what would perhaps be better, to provide that the duplicate should be sent to this office. I could then tell on any day what the receipt side of a treasurer's accounts should show. The receipt side is the weak side of the account. The treasurer has a voucher for all payments made, but none for many of the receipts. The duplicate receipt takes the place, in some degree, of a voucher. The receipt, as made in Berkshire, in Hampden, in Barnstable and in Hampshire, works admirably. The receipt and stub bear the same number, and the stub often saves the treasurer the trouble of going to the clerk's office or elsewhere to find out what a certain payment was for. A somewhat long experience in the military service convinced me that the system of duplicate invoices and receipts in the army can hardly be improved. So far as practicable, I would introduce these in county affairs. There are but few sources of revenue to counties, and in many cases sworn certificates are now required of those who pay money to a county. The assessment of the county tax answers for an invoice for that item. Dog-license money is accompanied with a sworn certificate; so are the fines and costs from courts and clerks, trial justices and masters of houses of correction. The sheriffs appear to be an exception; but they can be required to make a certificate when they pay over money, relieving them from the semi-annual account called for by Public Statutes, chapter 217, section 13. Hardly anything remains except money received for peddlers' licenses.

I recommend that all public officers paying over money to county treasurers be required to send a duplicate certificate to this office, as is done in Boston; one certificate going to the auditor, the other to the collector. Then I should not only know without asking whether the law is promptly complied with, but also the amount paid over, which will aid me in the matter of examinations. At my request, the clerk of the supreme judicial court for Suffolk, and the clerks of the central municipal court of Boston, who pay over monthly, send duplicate certificates to me; and perhaps I have authority to require these as "exhibits" under the provisions of section 4 of chapter 438, Acts of 1887; but I prefer it should be a distinct requirement of the Statutes.

Payment by a Treasurer without Authority of Law.

By section 10 of chapter 23, Public Statutes, a treasurer is made personally liable for any sum of money paid by him to a *county officer* without authority of law. Why not make him personally liable for paying county money to anybody without authority of law?

Payment by Check.

This method of payment, without obtaining receipts, is carried to excess in one or two counties. As the law seems to sanction it, I have no right to complain. It does seem to me, however, that the receipt should be obtained in all cases where it can be without inconvenience. The provision of section 17 of chapter 23, requiring treasurers to notify the district attorney when officers are delinquent for ten days in making required payments, has not much vitality, for obvious reasons. The officers named are powerful factors in the political economy of counties, and treasurers naturally shrink from notifying them of their delinquencies. As the law requires me to notify the Attorney-General in case of similar delinquencies, I might at the same time notify district attorneys if that duty were imposed upon me. But, whether transferred or not, there should be a penalty attached to the law, — a fine of fifty dollars; and, in case of a clerk of a court, make neglect to comply with the law a reason or ground for summary removal from office, under the provi-

sions of section 4, chapter 150, of the Public Statutes. That would be a penalty worth having. The coolness with which some public officers disregard the law is amazing. Section 21 of chapter 23 provides that "the county commissioners shall examine and allow the accounts of county treasurers;" but nothing is said as to what the commissioners or the treasurer shall do in case the former find they cannot allow the accounts of the latter. There seems to be the same defect in section 32, where the board of examiners are to examine the accounts, and, if they find them correct, they are to certify on the books of the treasurer. But what are they to do, and what is the treasurer to do, if the examiners refuse to certify to the correctness of the account?

The Annual Reports of Treasurers.

Section 28 of the same chapter provides that the treasurers, at the close of each year, shall make a particular statement of the receipts and expenditures of their county, except costs of criminal prosecutions, and expenses of courts, of which they shall make a general statement. I do not think any county treasurer in the Commonwealth, with the single exception of the treasurer of Bristol, complies with that law. I have recommended a fuller report to all the treasurers, but without result except in promises.* If those promises are kept, next year the reports will be more particular. There is a restraining influence somewhere. One treasurer agreed with me that his report was a little meagre, and expressed his entire willingness to make it as full as I desired it, but asked for time to talk with the commissioners and the clerk. The result of that talk is yet to be revealed. It is to be remembered that the board of examiners are to approve that statement before it is distributed to the people.

Now, it does not give much information to report that eight hundred dollars are paid for auditors and masters, one thousand dollars for coal, and two thousand five hundred dollars for extra clerical assistance in the clerk's office. What the people ought to know is, who were the auditors, and how much did each receive; from whom was the coal

* Since this report was written, the treasurer of Plymouth County has published a full and satisfactory report.

purchased; and what is the name of each person employed in the clerk's office, and how much was paid to each. It is of no great importance to be told how much dog money was paid in by a given town; but it would be of advantage to state how much dog damage was paid to A. B., and the price of hens and chickens would be regulated in some degree by such information. One treasurer assured me, that, if he published the names of the parties from whom the county bought supplies for a certain institution, he would have all the other dealers at his heels. In half a dozen counties the clerks sit as auditors or masters, and receive considerable fees from the county therefor. That they make good auditors is certain, or they would not be appointed; for an auditorship usually is a matter of choice of the parties to a suit. But when they come to the Legislature for increased salaries, or go to the county commissioners for extra clerical help, then to know the details of their outside earnings is material and important. In one county the number of items charged to one person attracted my attention; and, on inquiry as to who the dealer was, I was told he was the chairman of the county commissioners. There was no evidence to my mind that the purchases were not advantageous to the county, and entirely above-board; but I searched in vain for any evidence that the chairman stepped down and called in a special commissioner when his own bills were passed upon by the board. This was not done in a corner. The fact was discussed on the stump in the county at the last election, and the commissioner was triumphantly re-elected. But, if the details of his sales to the county were spread upon the record, and circulated broadcast in the county, I do not believe the sales would be repeated. This dealing with the county by a county officer I do not believe is right. The Statutes forbid State officers, members of city councils, and other city officials, from being interested in any contracts in which the State or city is interested, under heavy penalties. (Public Statutes, chapter 205, sections 11, 12.) This law ought to be extended to embrace county officers. But publicity cures evils, and therefore the details of such proceedings should be published to the people. Cities and towns by their auditors, the State by its auditor, give all the details of

the business of the corporations named. Why should the county be an exception? It would be a good thing, in my judgment, to publish some of the details of court proceedings, — the fees, for instance, paid to officers in the superior court. Again, the commissioners sometimes reject claims against the counties, and cut down bills. But they get no credit for it, because nobody knows it. If they followed the rule in New York, of publishing in parallel columns the bills presented and the bills allowed, and thus show the details of county transactions, and whether the county auditors do in fact audit anything, the result would be most satisfactory. The reproach of secrecy brought against the board would be in a large measure removed, if the proceedings were given to the people in more particularity. The cost of printing would be of no consequence. The treasurer might need more pay, and even extra clerical assistance; but the people would gladly pay the bills, if only they could get the information they desire, as to where the county money goes. I fully believe that such a county publication would be the best possible investment of all the funds that will be needed for its accomplishment.

Notifying Officers.

Section 29 of chapter 23, Public Statutes, requires treasurers once in each year to notify officers to make all required returns. There is not much vitality to this section. A proper penalty upon the officers themselves would be the better law.

The County Commissioners.

The commissioners keep no accounts, that come under my inspection or observation. But, as they audit and order paid out of the treasuries the greater part of the money expended by the counties; and as, under the fee system, the clerks charged by the page for recording orders and proceedings before the court of the commissioners, — the records and methods of doing county business came properly before me. My right to examine the records of the commissioners has been challenged but once, and then the challenge was quickly withdrawn. When I found that thousands of dollars were being paid out of the treasury of Bristol, upon orders signed

with a rubber stamp, bearing the *fac simile* of the clerk, and no other legal verification, it seemed to me essential to go to the records, to see if indeed the bills had ever been duly approved and ordered paid by the board. I find as great a variety in the ways of doing business in this court as in all the others. I am concerned only in such methods as relate to the approval of bills which take money out of the treasuries. It seems to me the laws in relation to these officers are quite ambiguous, and some of them contradictory.

I invite attention first to Public Statutes, chapter 23, section 7, where it is provided, that, with certain exceptions, no money shall be paid out of the treasury except "upon orders drawn by the county commissioners." What is an order, within the meaning of this law? In some counties a separate order is drawn for every bill; and in Worcester the clerk of the commissioners exhibited some old records, where the orders were all recorded separately. The section referred to also contains the provision that the clerk shall keep a record of such orders, and further provides that "the bills or evidence of county indebtedness, for which payment is ordered, shall be delivered with the order to the treasurer." It certainly looks, on the face of it, as if the intention of the Legislature was, that a separate order should be drawn in each case. When we refer to the fact that in so many counties, under the fee system, the clerks charged twenty-five cents on each order drawn by the commissioners, it looks a little as if they felt they should fully earn their money by drawing separate orders for every bill. In Plymouth, the practice when I first visited the county was for the treasurer to require the party in whose favor an order was drawn to indorse it, and that was taken as a receipt; as if the order were a negotiable instrument. If that view of the law be right, I think the statute should be changed; because it is impracticable to draw bills in separate orders. As I have said elsewhere, in large counties there will be three or four thousand bills presented to the commissioners for allowance in a year. Such a construction of the law would prevent the use of the "pay-roll," now so generally adopted in city and county business.

The next question is, When and how is an order

"drawn" by the county commissioners? Are the commissioners to sign the order, one, two or three of them, or is the clerk to sign alone? They are not to audit bills, approve them, and order them paid, but orders are to be drawn by them. In dog-damage cases (Public Statutes, chapter 102, section 98) they are to "issue an order upon the treasurer" for such damages, etc. By section 6, chapter 40, the treasurer is to pay to the law library association "such further sums as the county commissioners may deem necessary and proper." By chapter 26, section 24, as amended by Statutes of 1887, chapter 310, they are to "audit" the accounts of medical examiners, and "certify to the treasurer what items in such accounts are deemed just and reasonable; and such items shall be paid by such treasurer." By section 33, chapter 159, Public Statutes, clerks are to be allowed, for extra clerical assistance, "such sums as the county commissioners by a writing signed by them approve." Here is certainly a variety of prescriptions to the county commissioners. It is not to be wondered at that the practice has the same variety. In some counties the chairman signs the bills; in others, two of the commissioners sign; in Plymouth, all the commissioners sign on the back of each bill; and in Middlesex there is no signature at all upon the bills. In all the counties where separate orders are drawn, the order is signed by the clerk; and where the payroll is used, as in all the large counties, the clerk as a general rule signs the roll, the bills being delivered as vouchers. In Essex and Middlesex the commissioners have a book in which they enter the bills, take that to their clerk for his attestation, and then the clerk makes a copy of that, in substance, for the treasurer. The difference in the two counties seems to be, that in Essex two of the commissioners sign each bill, while the other writes them in the book; and in Middlesex, the bills are not signed at all. At the hearing in 1880, the chairman of the Middlesex commissioners, upon the subject of the records, testified as follows: "Our books are very simple; we have only a book in reality [the commissioners] where we enter payments, current expenses of the county, and from that the clerk draws the order on the treasurer; and we enter the items to be paid on our books,

and for that the clerk draws an order. Each item goes to the treasurer." This testimony was given in reply to questions put thus: "Whether the records of your board, the record of the previous meetings, are read for your approval at each meeting? *Answer.* They are not. *Question.* Are they ever read for your approval? *Answer.* They are not. *Question.* What evidence have you that your records are properly kept in a proper book of records?" Answered as above. (Senate Document No. 225, 1880, p. 138.) In Bristol, the commissioners have a stamp, and each bill is stamped as follows: "Bristol, ss. Board of Co. Com's. Examined, allowed and ordered paid. F. G., Chairman. Attest, S. B., Clerk." This goes to the treasurer as his order to pay. In very many counties the commissioners have a stamp indicating that the bill is examined and allowed, and then an order drawn separately. The chairman usually signs the bills, but in Plymouth all the commissioners sign the bill. I found, in Dukes County and in Nantucket, the illegal and dangerous habit of passing a vote that in future one of the board should be allowed to approve bills, and then the clerk should order them paid. This was done to save the necessity of a meeting. This practice was promptly discontinued, but not till after disaster in Nantucket.

Now, what is the legal and proper way to draw money out of the treasury of a county? In Nantucket, during the year 1888, the clerk of the courts was indicted and convicted of forging or falsely making an order, acquittance or discharge for money. That is to say, he made an order on the treasurer in the usual form, for a bill which had been paid once. The defendant's counsel raised a question as to the proper method of approval by a board of county commissioners, claiming that, as all the members or a majority did not sign the bill alleged to have been forged or falsely made, the defendant was not guilty. The case went to the supreme court, but the point was found not necessary to be decided, the case going off on another point. A decision would have been of great practical importance. In Norfolk County I found the records of the county commissioners contained no evidence that any dog damages had ever been assessed or paid in that county. And so with medical examiners' bills. The way

these matters are disposed of in that county is for the commissioners to pass upon the question of damages by dogs, and send direct to the treasurer a decree assessing the damages; and then the treasurer pays, as I have already stated. The decree is signed by the chairman alone, and no record is made of it. In cases of bills of medical examiners, the board audits the bills and these are sent down as "audited," and the order is signed by all the commissioners, and not by the clerk at all. Which is right? Is Norfolk right, and all the rest of the counties wrong? The clerk in Norfolk, by doing what other clerks have done, under the fee system, would have added to his salary probably two hundred dollars per year, by attesting orders in dog damages and medical cases. So it must be clear that he did not think the law required him to keep any record, or sign any orders for dog damage, or for the distribution of the dog fund. The commissioners and the treasurer must have taken the same view. I do not mean to be understood that the commissioners of Norfolk have not adjusted the claims under the dog law, and audited the bills for medical examiners with the same care and fidelity that is bestowed in the other counties. What I mean to say is, that, in my view of the law, there is no legal evidence of it. I think the clerk alone is the person to attest orders which take money out of the treasury to pay dog damages or to pay medical examiners, and that the record of the board should show the whole proceedings. It may be, that, under the peculiar wording of the statute relating to extra clerical assistance, the commissioners' signature "under their own hand" is alone required, and not that of the clerk in addition, because he is the party certifying to the necessity of the extra clerical help, and therefore disqualified to act as clerk in attesting the order drawing the money. I have said to the commissioners, in certain instances, that it did not seem to me that the signature of the chairman, as in the Norfolk case, or of all the members, as in Plymouth, has the slightest validity or importance in law. The clerk is the only person who can certify to the action of the board, unless in the case cited of extra clerical assistance. (Rich *vs.* Lancaster R. R., 114 Mass. 514.)

And this brings me to what I regard as the greatest irreg-

ularity, and the most dangerous one that is to be found in the transaction of county business; to wit, the fact that the clerks of the county commissioners do not in general attend the meetings of the boards, nor keep the record of the proceedings; the books are filled with litigation caused by the fact that these records are not properly kept. There is an explosion every little while over the question, it enters into political campaigns, and yet nothing is done which furnishes a complete remedy. I do not mean to say that the clerks of the county commissioners do not keep a record. I do mean to say, with all the emphasis I can employ, that they do not in general attend the meetings and keep the record of the proceedings of the county commissioners in any legal and proper sense. They may keep a record of what the chairman tells them has been done, or even what the memorandum kept by the chairman, or by all the board, indicates has been done; but this is not what the law contemplates, when it says the "clerks shall attend all the courts of which they are clerks, when held in their respective counties, and the sessions of the county commissioners, and record their proceedings, and shall have the care and custody of all the records, books and papers appertaining to and filed or deposited in their respective offices." (Public Statutes, chapter 159, section 16.) And in section 6 of the same chapter, "the clerks and assistant clerks of the courts of the several counties shall be clerks and assistant clerks of the county commissioners." And in chapter 22, section 20, that the clerk shall have custody of their seal. The commissioners do nothing, and can do nothing, except what the record says they have done; and that record can be kept only by their clerk. Their own memoranda is of no legal value whatever. They need keep no record, unless the register required in chapter 220, section 12, in prison matters, is an exception. The law makes the clerks of courts clerks of the commissioners, because those clerks have the ability, technical and legal, to make a record properly. How often is that record amended at great expense, because it was not properly made at first! (Andover *vs.* County of Essex, 5 Gray, 393. Ellis *vs.* County of Bristol, 2 Gray, 370. Gloucester *vs.* County of Essex, 116 Mass. 579.)

And in the last case the records had to be amended from recollection. It may be, that, although the record is made up from hearsay, it cannot be impeached collaterally, but it ought not to be impeachable in any process whatever, for want of attendance by the clerk. I was at Dedham on the first Wednesday of January, and was in the court of commissioners when the register of deeds elect was qualified by the chairman. No clerk was present, and I ventured to ask about the record of such an important proceeding. The answer was, that the board kept a memorandum of what the board did, and at night reported in gross to their clerk, who kept the record; and that they had no power to compel the attendance of the clerk. That may be so, or not; but they have the power, I take it, to appoint a clerk *pro tem.*, and I advised the commissioners in Plymouth, when the clerk did not attend, to appoint one of their number clerk *pro tem.*, and have a record made and attested of what was done in presence of the clerk *pro tem.* Within a week a county commissioner has told me he knows nothing of the record of the board, never has it read and corrected, or found to be correct and approved. He did not seem to think the board had any control of the clerk. I am not sure about that; but, if they would print in large type and hang in their rooms the opinion of Chief Justice Shaw in Ellis *vs.* Bristol, above cited, it might be well for all concerned. Here it is: "The county commissioners have the same power over their clerk as any other court of record; and their clerk, although not appointed by them, is bound to conform to their wishes, otherwise they would be subject to him." I doubt if a legal meeting can be held without a clerk. A banking corporation would appear ridiculous that should hold a meeting without a clerk, or should proceed to business without reading the record of the last meeting. The county is the biggest kind of a corporation. The law makes the commissioners the directors, and the clerks of courts clerks, and provides that the clerk shall attend and keep the record. He ought to do this. He has been paid liberally to do it, and, if he has not the time, more force should be put into the office. I do not stop to say who is to be blamed for this condition of things. The condition is what I am trying to attract attention to.

The clerks say the commissioners do not want them to be present, and the commissioners say they cannot compel the clerks to be present; and so it goes. The clerks need not be present all the time; but, when the board organizes, and when it is ready to vote on any question whatever, I believe the clerk should be present to record the fact. In all seriousness, is it not a farce for a clerk to record as clerk what he knows nothing about except what he has been told?

In looking over the Senate Journal for 1887, my eye fell on an order introduced into that body, directing the judiciary committee "to consider the expediency of ordering the commissioners in the several counties to make and keep full, accurate and complete records of all the meetings of said boards." Leave to withdraw was reported, I suppose on the ground that the law now compels the clerks to do this, and it would not be wise to impose the duty upon the commissioners. I had the curiosity to trace that order, and found it was introduced on suggestion of a county commissioner, who said the board to which he belonged kept no records of its meetings, and had done things without his knowledge, such as approving bills, and dismissing a petition that affected the rights of parties who appeared in the proceedings.

I recommend that the statutes be codified so that it shall be plain how commissioners are to vote money out of the treasuries, and that means be devised to compel the attendance of the clerks, and to appoint clerks *pro tem.* in their absence.

What Constitutes a Board of Commissioners.

It is the practice, to a greater or less extent, for two commissioners to be present when bills are approved. The law is a little ambiguous on this point, I think. By chapter 22, section 17, of the Statutes, it is provided that "if either of them [the commissioners] is unable to attend, or if there is a vacancy in the board, the other member or members shall give notice to the special commissioner, who shall forthwith proceed to act as a member of the board;" clearly implying that there must be a full board present when any question is before the board. Then comes section 18, which seems to

contradict all this by providing that "no business in which opposing parties appear shall be finally determined, except by consent, unless there are three disinterested commissioners present and acting thereon." What more important question can arise than that of approving a bill for building a court house, or for any other county purpose? The absent commissioner might persuade the two others that the bill was a bad one, or excessive in amount. The law should be made consistent, at least.

Advertising Contracts.

I think section 22 of chapter 22, relating to advertising contracts for public work, is evaded in many cases. The word "contract" seems to afford some scope for evasion. If the statute provided that no public work shall be begun until proposals are made, the difficulty would be cured.

Pardoning Criminals.

By the provisions of chapter 375, Acts of 1885, it is provided that county commissioners may release prisoners committed to jails, houses of correction and houses of industry of their several counties, for non-payment of fines and costs, when they are of opinion that such persons are not able to pay the same, or that it is otherwise expedient. Can the board act here except as a full board, and must not a record of the proceedings be kept? This business is done in a loose and unsatisfactory manner, both to the commissioners and to the public. Unless there is some fundamental objection to it, it seems to me this power had better be conferred upon the master of the jail where the prisoner is. He knows all the facts, to him the appeals and importunities of friends are made; and the business could be more cheaply and expeditiously done. Take Essex, for instance, with a jail at each corner of the county and a commissioner in like location. If my view of law is correct, the commissioners must all meet and vote on the pardon of a man, and that vote must be recorded by the clerk. The prisoner's rights are concerned, and if the work is worth doing at all it is worth doing well. The view just expressed of the law is my view in regard to approving bills, and the endorsement of the

commissioners, one or more, is of no use, except they may deem it a check upon their clerk. I take it, if the commissioners send for their clerk after they have finished their deliberations and examinations, and announce to him that they are ready to vote on one or a hundred bills, which they hand to him, and then do vote to approve them and to order them paid out of the treasury, then the act of the board is complete, and it is immaterial that the chairman sign them, or that all sign them. If they stamp them or sign them as a check on the clerk or on themselves, when they come to read the record of the last meeting or to examine the treasurer's accounts, as they are bound to do every twelve months, the plan is a good one. The commissioners do a prodigious amount of work, especially in Plymouth County, where the clerk has been derelict in his duty for many years; and I am impressed with the belief that, in general, county affairs are well guarded by them. Some things I criticise, for the reason that the system seems to be bad. The commissioners of Plymouth told me there was no reason in the world why their records should not be written up in two days after a meeting, or just as soon as the clerk has time to do it. That is my view of it everywhere. The ministerial part of the commissioners' duty can be entered up in a special book, and that should be done and duly signed by the clerk before the bills or orders are sent to the treasurer.

One thing more. I recommend that the commissioners be required to take an account of county property at the end of each year, and insert that in the county reports recommended elsewhere. All the counties now have, or soon will have, elegant court houses, commodious jails, ample law libraries, furniture, etc., which would make a very good showing of assets. The people will like to look at them, and know and appreciate what they have to show for so much money expended.

Legislation not Already Suggested. — Naturalization and the Fees Therefor.

I found in my investigation that the police court of Williamstown, a court then without a clerk, had been naturalizing aliens. It seems to me wrong, and I so signified my

opinion to the justice of that court. Thereupon an opinion was obtained from the Attorney-General, which I insert in full, the same having been addressed to the Secretary of State: —

"In contemplation of chapter 345 of the Acts of 1885, every police, district and municipal court has common law jurisdiction, a clerk and a seal, and has jurisdiction, under said chapter, of primary declarations of intentions of aliens to become citizens, and final applications for naturalization of aliens." (8 Metcalf, 168; 9 Gray, 3.)

I do not find that any other court without a clerk exercises this jurisdiction, and the court of Williamstown has since appointed a clerk under the statute. This matter is of such transcendent importance, it would seem an opinion of the supreme judicial court, or legislative action, should settle it finally. Under existing law, all fees from naturalization go to county law libraries. And, under the Act of last year, or through its operations, I am not sure but all the fees turned over by the clerks of courts are to go to the county law libraries. The county of Worcester this last year paid to the law library association of that county more than five thousand dollars.

To prevent extravagance in the counties, I recommend some limitation to the amount to be paid in each county. As the law now stands, it would seem to be entirely discretionary with the commissioners how much shall be appropriated. (Public Statutes, chapter 40, section 6.) When the limit was fixed at two thousand dollars, there was no requirement that naturalization fees should all go to the library. I am of the opinion that economy requires that the limitation of two thousand dollars for such counties as Worcester and Middlesex and Essex should be adopted, and graded down to the wants of the respective counties. I am advised that in some of the law libraries are boxes of books that have never been opened, and would be of little practical value if spread upon the shelves. Good working libraries are needed, but not rare volumes nor fine binding.

Under the provisions of section 6 of chapter 345, Acts of 1885, naturalization fees were to be paid into the treasuries semiannually. If there be any doubt that this provision

was repealed by chapter 438, Acts of 1887, and chapter 257, Acts of 1888, the doubt should be solved, so the clerks can pay over these fees when they pay their other fees, as they now do, I believe, universally.

Fees to Cities and Towns.

Inadvertently, as I believe, when section 34 of chapter 154 was amended by chapter 438, Acts of 1887, section 35 was not amended. I recommend that settlements be made with cities and towns, under this section 35, at the same time settlements are made with the counties, for convenience of book-keeping.

Record and Fee Book.

The provisions of section 77, chapter 155, Public Statutes, are not carried out with much uniformity, and the greatest question now in my mind is, just what is the best thing. The uniform blanks and dockets may solve the problem. All kinds of fee books are now in use.*

Bonds of Clerks of Courts.

It seems to me the bonds of clerks of courts should be increased, and the condition changed. By chapter 159, section 14, the bond of the clerk and of the assistant is fixed at two thousand dollars. And, by section 23 of same chapter, if the bond is forfeited, the sum recovered thereon is apparently to be applied, first, "to making up the deficient records, under the direction of the court in whose records the deficiency happens." Under this provision, I apprehend, in Plymouth and in some other counties all the courts would have to file an interpleader to determine the application of the money from the bond. And there would be little left to respond for money paid into court.

And so with clerks of inferior courts. They differ so greatly in amount of money received, the bond might well be adjusted to suit the court. In 1874, by chapter 224 of that year, the first district court of Essex was established,

* As this section, although practically a dead letter, seems to be imperative, its modification would seem to be necessary before a new fee book can be prescribed by any one.

and the clerk's bond fixed at eight thousand dollars, and by chapter 394 of same year it was cut down to one thousand dollars. A court that receives a thousand dollars a month ought to give a larger bond than a trial justice in Barnstable. I find no provision of law requiring examination of these bonds after they are given. The time being ordinarily five years, an annual inspection of these bonds would seem to be a matter of prudence.

Warrants Issued by Special Justices and Justices of the Peace.

I recommend that the last clause of page 1123 of Public Statutes be amended by providing in substance that one dollar shall be paid for each warrant issued and returned into court. As it now stands, the justice can issue as many warrants as he pleases, and not return them into court. I would add the same to section 3, chapter 199, relating to warrants issued by special justices, and that in no case shall these magistrates issue a warrant written on the same paper with a complaint.

Withdrawing Appeals.

I have already spoken of costs of the mittimus, where a defendant pays costs of the commitment. I also recommend, that, where a defendant withdraws his appeal under the provisions of sections 64 and 65 of chapter 155 of Public Statutes, if the sentence was to pay a fine and costs, and he does pay them, after his appeal is waived and withdrawn, that he be required to pay the costs of the mittimus and of the jailer in taking him before a magistrate. The expenses of withdrawing an appeal are often very large, and my attention has been called to one case where the jailer before taking the prisoner to the magistrate wrote to him to ask whether he would allow the prisoner to withdraw his appeal, and was answered in the negative, whereupon the jailer did not take the prisoner before the magistrate. This seems going very far, but conveys the idea of the jailer in regard to running the county into expense. A bill with this provision in it passed the House last year, but was defeated in the Senate. (House Document, 1888, 211.)

I suggest a still better idea as to withdrawing such appeals. Suppose a defendant in jail in Worcester, having been committed from Athol, sixty miles away. Why should he not be taken into the district court at Worcester, and allowed to withdraw his appeal, without expense to him or to the county? The courts are of equal rank, and the justice at Worcester could go with the prisoner to Athol, and there sit in place of the Athol judge, and there reaffirm the sentence. There is no principle at stake. Let the clerk at Athol be compelled to furnish a copy of the judgment to the jailer in Worcester; let the Worcester magistrate indorse his action thereon, and let the papers be returned to the court at Athol, so the record will be complete. Thousands of dollars would be saved to the counties. This is not original with me. In examining the records of a trial justice, I found a case where he went out of his bailiwick into the county seat, and into the jail, and there reaffirmed a sentence, whereupon the defendant paid his fine and the jailer let him go. Both magistrate and jailer strained the law, I apprehend; but the idea was a good one, and I put it down in my note book. The very fact that a defendant cannot pay the costs, as in the case referred to, doubtless in other cases prevents the exercise of a right which a defendant certainly has under the law. Such a law as that recommended would be in the interest of liberty as well as county economy.

PAYMENT OF WITNESSES, UNDER CHAPTER 180 OF 1888.

This act was one of the best ever put upon the statute book, in my judgment. But it is not acquiesced in by some of the county treasurers. That is to say, the last clauses are not obeyed; but the old illegal system of waiting for the sessions of the superior court is kept up. The treasurers decline to receipt for the money advanced to pay witnesses; and the clerks are practically compelled to pay witnesses out of their own pockets, and do not get a receipt for the money that has really accrued in their court, and been received by them. If this is done merely because the law is not clear as to whether costs should be paid back to clerks of courts, instead of to the party to whom it is due, the exhibition of defiance of the law is not so bad. But it seems to me so plain,

and so humane a law in itself, that no mere question of book-keeping should interfere with its full enforcement.

In Suffolk the county auditor does not find the law satisfactory to him, as to one of the outlying courts, and suggests that the law should not apply to Suffolk. But here was where there was the greatest hardship in withholding pay from witnesses in appeal and grand jury cases. If any other satisfactory method of paying witnesses can be devised, Suffolk might be exempted from the law. The money paid out under the law has never been in the Suffolk treasury, and it seems to me the question of auditorship does not arise in the true sense of the term.

Money Paid into Court, and the Construction of Chapter 438 of the Acts of 1887.

A question of considerable importance has arisen upon the true construction of the statute establishing this office, in relation to my right to require clerks of courts and trial justices to make return of money paid into court under the statutes and rules of court. This question has been raised by the clerk of the superior court of Suffolk for civil business. He declined to return such money as a part of his receipts and expenditures, and states his reasons at length in a letter, which, by his permission, I herewith print, as the best argument to be made on that side. No other officer has made any issue upon it.

[copy.]

Mr. Boring: —

Dear Sir, — The deposits which you mention have nothing at all to do with my "receipts and expenditures." The deposits are not one-tenth "money paid into court," but principally and almost entirely under a law which provides that a party appealing from the lower court may deposit with the clerk $100 in lieu of a bond to secure the costs of the suit in this court. My deposit book is open for your inspection any and every day, but I decline to stultify myself by making it a part of my "receipts and expenditures," which it is not in any sense whatever; and many excellent lawyers concur with me. Another view also occurs to me. If you should alter my account, and put that in as part of my "receipts and expenditures," it would be falsifying the true facts and making the receipts much more than they really are; and I decid-

edly object to deposits being made a part of the receipts, by which an inference may be drawn that I am receiving more fees than I account for. This is a *trust*, not *fees* received. I am a trustee for each party who deposits; and if these deposits are made a part of my "receipts and expenditures," then the county or city or Commonwealth becomes the trustee. I have nothing to conceal, but I wish the truth and not fiction.

Respectfully yours,

Jos. A. Willard.

I dislike to differ with so able and experienced a clerk, and the lawyers whom he has consulted, but have to do so *in toto*. To my mind there is no question about the law. In section 3 of chapter 438, Acts of 1887, we find this language: The controller "shall also visit or cause to be visited, at least once a year, without previous notice, . . . clerks of the supreme judicial court and superior court in the county of Suffolk, . . . and at such times shall make an examination of the books, accounts and vouchers of the aforesaid officers, ascertaining in detail the various items of receipts and expenditures; and said controller shall ascertain the actual amount of cash or money on hand in any of the aforesaid departments or with any of said officers, and shall require, so far as possible, uniformity and correctness in the method of keeping said accounts, and may order such classification of receipts and expenditures as he sees fit."

In section 4 is this clause: "And it is hereby made the duty of all such officers and persons to make returns and exhibits under oath to said controller, in such form and at such time or times as he shall prescribe."

And section 6 has this provision: "The several officers and persons named in section 3 of this act shall keep an accurate record, and shall, on the fifteenth day of January in each year, make return under oath to said controller of all sums of money which have in any way been charged or received by them, or to their use, by reason or on account of their said offices, or in their official capacity; and also of all expenditures made or incurred by them, by reason or on account of the same, for the year ending with the thirty-first day of December next preceding."

Now, then, the first thing done was to prescribe a cash book

for Mr. Willard; and in one of the columns of classified space was a space with the heading "Money paid into court," and the clerk was directed to keep his accounts on that book. At the end of the year I sent Mr. Willard a blank form on which to make the return called for in section 6, above quoted. He made his return in due season, but it did not contain a satisfactory statement of his trust money, or money paid into court; and I made substantially the requisition for an exhibit of those funds, provided in section 4, whereupon a memorandum of the amounts was forwarded, but with the letter of protest above printed. He courteously permitted me to go to the bank and look at his book of private funds, but I disavowed any right to look at any funds of which I could not legally take notice. In spite of the protest, I have compiled the returns of Mr. W. as the law says I shall do (chapter 438, Acts of 1888, section 6), and find an error of one thousand dollars, probably in the footing. Now, how does Mr. Willard receive this money? He says in trust, and so we all say. But does he not receive it as clerk, and in that capacity alone? Why not pay money to the sheriff or the presiding judge? The law says the clerk shall receive it. It must be such money is a part of his receipts; at any rate, Mr. W. admits part of it is "money paid into court," also that most of it is paid in by appellants. It is sent "to the clerk" with the papers by the magistrate below, and he receives it as clerk "in his official capacity." (Public Statutes, chapter 155, section 31.) The clerk is to hold it till the disposition of the case, and then pay it to the appellee or appellant, or as the court may direct. (Chapter 155, section 32.)

And by the same section the court may direct how the clerk shall deposit it. And, by Rule XI. of the supreme court, he is made the custodian of all money paid into court; that is to say, he *receives* it, and keeps it till payment is called for "to the party entitled thereto." It seems there is no difference what the money is; a tender, perhaps, money paid in on the equity side to redeem, etc., — all is in the clerk's hands, and he certainly has *received* it as clerk. He objects to having *deposits* made *receipts*. Well, he had to receive it before he could deposit it; and it is no more a deposit than

his funds he receives for sale of writs and entries, which, I am glad to say, he deposits, as all public officers are in duty bound to do. The fallacy is in Mr. W.'s book-keeping. He cannot be charged with receiving more than he pays out, if he enters on one side his receipts and on the other his *payments*, — if that is the word, rather than the expenditures. Then, if the payments are less than the receipts, he has the balance on hand, to be sure, and his book should show that balance any day. This is a trust, says Mr. W. So it is, as all the money he receives now is in trust, — in trust to the county, in trust to the appellant, in trust to the appellee, in trust to the mortgagor, etc. I do not see how calling the deposits receipts makes anybody trustee but the clerk. I do not see how any possible harm can come by strictly complying with the law. The only balance he can have at the end of the month, after paying over to the county, as the law directs, is this balance of trust funds. That is so stated by all the other clerks; and there is no force in the argument that he may be charged with receiving more than he pays out. The fault is all in his book-keeping. I think he should enter this money on his cash book in the proper column; and, when he takes the sweeping oath which he does take, he cannot leave out of it "money paid into court." And is not this trust money the very money to be closely looked after? When he concedes my right to look at his book of deposits, it seems to me the case is at end. A decision by the Legislature will settle all controversy, which is in the best of temper, as a mere matter of right under the law.

While upon this subject of construction, I respectfully ask the Legislature to define my duties in Suffolk County. It is clear I am to examine all the courts, but what other county officers? The sheriff evidently considers himself within chapter 438, Acts of 1887, as he brings his books to me and solicits examination. He has a fine set of books, as have the treasurer, collector and auditor, who have most courteously shown their methods of book-keeping for my instruction, and to whom I return my thanks.

Penalties for not seasonably making returns should be imposed. The officers have fifteen days to report to me,

and that is sufficient. I recommend that in section 5 of chapter 438, Acts of 1887, the time shall be changed from the first to the tenth days of January, April, July and October, to turn over all funds accrued in preceding three months. That will give ten days in which to make the returns, and leave a little money with clerks to pay witnesses.

A System of Checks.

My study and design has been to devise the best system of keeping the accounts of officers; and when a system of checks is under consideration, of course the usual presumption, that everybody is honest, is not in force. There are many charges in the accounts of clerks of courts, high and inferior, for which there can be no adequate voucher. Under the fee system I found it practically impossible to make any thorough examination of the books of a clerk of the superior court. I would be obliged to examine a common law docket, an equity docket, a divorce docket, a criminal docket, and a commissioner's docket, for entries, executions, orders of notice, decrees and term fees, etc. It was not practicable. With the new practice, the entries, being the main item, can be easily verified by the dockets. For the other items there can be no voucher except the book of the clerk. It is some check on him to be obliged to enter in his cash book the name of the party from whom money is received; for, in case of desire to watch closely, I could use such means as would enable me to find out whether writs, certificates, etc., were duly accounted for, and then follow up to see if the entries were all made on the cash book. One of the clerks at first thought it would be burdensome to enter the names of the persons from whom money is received; but, after a year of trial, he says it is no burden at all, as he knows the most of his customers. Treasurers are required to give duplicate receipts, and clerks are required to give receipts or accounts if any one asks for them. (Public Statutes, chapter 199, section 27.)

Endorsing Sentence by Judge.

One check in criminal proceedings I recommend, which, it seems to me, will eventually prevent what is said to have

taken place in Boston; to wit, the entering up a sentence for a less amount than that imposed, and keeping the balance. I would have every justice of a court having a clerk, enter with his own hand the sentence of the court upon the complaint. Then the clerk would not dare, if inclined, to alter it. I have conferred with many justices, and this rule is adopted now in many courts. In the municipal court of Boston, the only objection to it was on account of the delay that might be caused. But that court now has one judge more than it had when I talked with the chief justice and the clerk, and I think there will be no objection. The clerk of this court has adopted a system of checks that makes it impossible to cheat without collusion of more than two persons. A three weeks' examination of his accounts failed to detect any error. A morning report from Deer Island and from the jail would be a still further aid in detecting fraud, if any were to be attempted. Or, the jailer might be required to give a receipt for the prisoner on the mittimus.

Fees to be Fixed.

It will be easy now, I apprehend, to prepare a fee bill which shall apply everywhere. Any two or three of the experienced clerks can give a list of every possible fee that can accrue. I would fix all by statute, and forbid the collection of any fee not in the list. The present law as to posting a list of fees has been a dead letter, practically, because so few fees were fixed. Complaint is made to me that the fee for orders of notice in divorce are not equal in adjacent counties. This should go in with the rest. If the fee system is to continue, I would recommend that a fixed sum be charged in criminal matters in the inferior courts, in place of the $2.35 now made up of several items. The entry fee in civil cases, too, I would have include the execution, as in the superior court. It is not long since the entry fee in the inferior courts was sixty-one cents. It is now one dollar, and perhaps that should include the execution. All fees in the inferior courts should be made payable in advance. The Acts of 1879, chapter 226, provided the entry fee in civil actions should be paid "at the entry" thereof. In compiling the statutes, that clause was changed into this, "for entry

of an action" (chapter 199, section 2); and some clerks say this does not require them to collect the entry fee in advance. There should be no longer a credit system in any court.

Criminal Costs.

His Excellency the Governor called attention to the subject of criminal costs, and suggested the reason why those costs must be very large in any event. He also suggested that cities and large towns apparently derive a considerable revenue from the country treasuries, at the expense of the small towns. I hope to be able to demonstrate the fact that the half has not been told. That Massachusetts leads all the States of the Union in petty offences, upon her statute book, is true. Governor Butler, with truth and poetry, said, in his inaugural address, "To people who live out of the State, who look to the number only of our criminals, it would almost appear that criminal offences with us were a State industry."

To show how often this great question of criminal costs has been before the Legislature, and what many of our chief magistrates, besides those already mentioned, have thought and written, I quote at length from the messages in the Blue Book. Said Governor Banks, in 1859:—

> The criminal costs of the Commonwealth require careful attention. I transmit a table from the office of the treasurer, showing the aggregate costs and the amount paid by the State.
>
> In ten years it amounts to $1,821,718. In 1848 there was paid $95,037; in 1858 there was paid $429,112. When the State assumed two-thirds of the criminal costs, the district attorneys were officers of the State, and they were therefore appointed to examine some portions of these costs. They are now elected by districts, and the State is without any supervision whatever.
>
> There is very great abuse in regard to criminal costs, and sometimes in the execution of criminal law, by justices. I give an illustration furnished me by county officers. In a town in an adjoining county, the criminal expenses for the October term, 1857, returned by justices, was $243. In the same town, for the same term, 1858, the costs returned by the trial justice were $32.62. In another town in the same county, the costs for the October term, 1857, were $185.79; while those of the trial justice for the same term, 1858, were $615.82. Some of the cities

require their officers to pay into the city treasury all fees received by them in criminal cases. The result is, that the profit of the city increases the burden of counties and the State. Such facts explain what appears a frightful increase in the number of criminals. It has latterly been discovered that a sufficient increase of arrests will pay to somebody criminal costs in ten years to the amount of nearly two million dollars. Thus, the criminal costs paid by counties and the State, amounting to the sum of $275,000 in 1855, and $224,000 in 1858, exceeded in the last five years the costs paid the preceding five years, more than seven hundred thousand dollars. From these and other causes that I cannot enumerate, you will not be surprised to learn that the cost of supporting criminals is greatly increased, and their number fearfully out of proportion with what we suppose to be the innocent condition of our people. I transmit a statement of the facts for a period of ten years, which will speak for itself.

This gigantic and frightfully increasing evil demands instant and adequate remedy. The remedy is simple, and easily applied. It is to remove the irresponsibility that now exists in every department of county administration, — financial and criminal, — and establish a system of minute, direct and absolute responsibility on the part of those who exercise power, to those for whom it is exercised. Either concentrate the power in the State, or transfer it from the State to the counties. It is impossible that this divided function — one party expending and the other paying — can ever be consistent with economy or wise administration.

It is not well to concentrate this power in the State. I therefore advise that it be transferred to the counties. Let the criminal costs, for instance, be divided. Let the costs that arise in towns and cities be charged to towns and cities, and the costs that grow out of county tribunals be charged to counties. Then, if the criminal power be abused in any town or city, the cost will be charged to the town or city where the abuse exists; and the people will look closely after those who administer criminal law, and hold them responsible for all unnecessary evils. It has so resulted in other States where it has been tried. To expend from five to seven million dollars in ten years, without responsibility for its disbursement or care in providing it, is certainly an agreeable duty; and it is possible that a change may meet with opposition. But I entreat the Legislature not to allow this important subject to pass, upon the ground that it is a mere transfer of taxes. It is no transfer. It is the annihilation of the excess and extravagance of county expenditures; and, if administered for three years, would not only remove the State tax and equalize expenditures

and receipts, but would create a surplus sufficient to pay the annual expenditures of every New England State, — except Massachusetts.

Two remedies are suggested for these difficulties: one is, that to county officers, as now appointed, should be added a county auditor for the examination and approval of all county expenditures; the other is, to establish a board of supervisors, consisting of one member from each town in a county, which, in addition to the duty of auditing accounts, should have limited discretionary power in directing county affairs, such, for instance, as relate to the division of towns, which would relieve the Legislature of very difficult and laborious duties.

His admonition not accomplishing anything, Governor Banks returned to the subject in 1860, and spoke as follows: —

The great continuing waste of public money is to be found in the arrangement of criminal costs, to which the attention of the Legislature was called last year. These costs — two-thirds of which are paid from the State treasury — increased from $79,800, in 1851, to $223,000, in 1858.

The transfer of these costs to the counties and towns would at once reduce them nearly to the amount paid in earlier years. It is not a transfer of taxes from the State to the county, but it will be an actual reduction. The counties and towns, being responsible for the payment, will examine into the administration of criminal law. No inconvenience will arise from this course. I have returns from nearly twenty States, in all of which criminal costs are paid by counties or by parties.

New York requires the county which asks a requisition upon another State to pay all expenses. It is a just regulation. The change in this State will relieve us of a great part of the general tax, without imposing it upon counties.

There is another consideration which makes the change important. I am entirely satisfied that actual crime does not increase in proportion to population. The returns exhibit this result, and it is confirmed by those best acquainted with the criminal calendar. This is a gratifying result, especially when we reflect upon the great increase of foreign population, and the fact that, of 1,870 persons confined in the various correctional establishments last year, 761 were of parents of foreign birth, as appears from tables returned to the secretary of the Board of Education.

But, while convictions for weightier criminal charges are actually diminished, the criminal costs seem to show a frightful

increase of crime. For the five years ending 1852, the convictions were 1,818; for the five years ending 1857, the convictions were 1,651, — a reduction of 137 annually. The criminal costs had increased from $557,000, in the first period of five years, to $1,264,000 in the second period. It is apparent that we should either admit a great increase of crime, or reorganize our system of criminal costs. The difference in expense is immaterial, compared with the injury inflicted upon the name of the State. These numerous arrests are regarded elsewhere as evidence of the failure of our system of civilization. The remedy for both the moral and the financial evil is to place the responsibility where the crime is found, whether actual or factitious. Ignorance promotes crime; and, when towns and counties find themselves charged with its consequences, they will seek a remedy. Education, police supervision, friendly advice, reformatory associations, and pulpit instruction, will be resorted to for the removal of an evil which is too lightly regarded where communities do not feel they are responsible for it. This is a subject of great importance, and I commend it to the serious consideration of the Legislature.

In response to this message, the Legislature of 1860 passed chapter 191, — "An act to define the costs of criminal prosecutions," — which act is the substratum of our present system of criminal costs and taxation. One section of that act, which dropped out in the manner I shall show, in 1861, to my mind furnishes the key-note to the situation. But, before quoting that section, I desire to add what Governor Andrew said in 1862, and what Governor Butler said in 1883, as recorded in their messages to the Legislature. Said Governor Andrew: —

The subject of criminal costs, which has recently attracted especial attention, still challenges our care. They are still excessive, owing, in part, to the fact of the freedom with which prosecutions of no public utility may be promoted, and in part to the character of criminal proceedings. The payment of trial justices by salary, requiring all their fees to be paid into the public treasury; the bringing the subject home more nearly to the people, by charging the costs of prosecuting minor offences upon the towns instead of the counties, and practising greater care in the creation of new and artificial offences, somewhat abundant in modern legislation, — would all tend to diminish costs by limiting prosecutions.

And a reform in our criminal pleadings and procedure might well be inaugurated, which, by simplifying the pleadings, reduc-

ing the opportunities to criminals of escape through technical and formal accidents, and discouraging frivolous exceptions, would prevent mistakes, expedite judgments, and promote justice.

And Governor Butler: —

The people also may justly complain of the enormous and increasing expenses attending the administration of the criminal law of the State. But this, again, is not the fault of the courts, but of the system. The truth is, the legal business of the State has simply outgrown the system and method of judicial procedure. This subject is a very difficult and complex one.

I will, in another communication, give to the Legislature such views of changes and alterations of this system as I may be advised and believe are necessary to remedy the evils of which complaint is made.

The utterances of these last two distinguished lawyers may well be heeded. And the tables of costs prepared by Governor Banks to fortify his position, which table is recorded in the Blue Book, will well pay for critical examination and comparison with the costs of criminal prosecutions as they exist to-day.

Let notice be taken that Governor Banks said, in 1860, that the criminal costs had increased from $79,800 in 1851, to $223,000 in 1858. I have made the best estimate I could of the criminal costs of the year 1887. The officers, many of them, have been so late in sending in their returns of last year, that I have been obliged to use my tables of 1887. Taking what the treasurers returned as criminal costs for that year, and what is paid by the inferior courts to officers, witnesses and informants, and including the criminal costs of Suffolk, as furnished me by the auditor of that city, the costs for 1887 will stand at $738,709.97. This does not include the salaries of the municipal court of Boston; nor the salaries of the judges of the superior and inferior courts; nor the salaries of sheriffs; nor the cost of juries, in counties where "mixed terms" are held; nor the cost of maintaining the district police; nor, I take it, the cost of the police force of Boston; nor the cost of the police force, as paid by other cities and the towns of the Commonwealth; nor of the district attorneys. Estimating that the judges of

the superior court spend one-third of their time in holding criminal sittings, and that the judges of the inferior courts spend two-thirds of their time in trying criminal causes, and that two-thirds of the expense of the district police is incurred in strict criminal business, I do not hesitate to say that I believe the State and the counties pay out one million of dollars annually in this Commonwealth for criminal prosecutions. The population of the Commonwealth in 1860 was 1,231,022.

It is clear, then, that our criminal costs are something appalling, and that heroic measures should be adopted for their curtailment. In my judgment, the remedy is not difficult to point out, although it may not be easy to give it practical application. Governor Butler expressed it truly. We have "outgrown the system" upon which we have been doing business for one hundred and fifty years. The problem has been solved in Boston. That city had to solve it. It has practically abolished the fee system, as applied to its police force, and its officers in the criminal courts, high and inferior. It has applied the rule laid down in that section of chapter 191 of the Acts of 1860, to which I have already referred. Let us restore that section in substance to the statute book, and I believe the riddle is solved. Let us look at the lost Pleiad, in all the brilliancy of her original orbit and magnitude: —

SECT. 3. No sheriff, deputy sheriff, jailer, constable, or other officer, who receives a salary from any county, city or town, for his official services, shall be allowed or paid any fees or extra compensation whatever for any official services in any criminal case rendered or performed, while such officer is entitled to salary as aforesaid; but the expenses of such officer, necessarily incurred and actually disbursed, in the service of any precept, shall be allowed and paid to him; and all fees, taxed in behalf of such officer, if paid by the defendant, shall be paid to the county.

I fully believe here is the key to the situation. If this section can be restored to life, with such modifications as I shall suggest, it seems to me we shall have control of our criminal costs. Why was not that section retained? There is no public record that it did not act admirably in practice. But, in 1861, upon a little order offered by a

member of the House from Roxbury, then a separate municipality, to consider the expediency of having the fees, taxed to officers and paid into the counties, paid to the cities, chapter 146 of that year was enacted, before Boston and the small towns of the Commonwealth appreciated what was being done. That act was brief, and here it is: —

> All fees for services in criminal cases, rendered or performed by any constable, city marshal, or other officer who receives a salary for his official services from a city or town, shall be allowed and taxed as in behalf of other officers; but all said fees shall be paid to the city or town from which such officer receives his salary.

That act stands to-day as the penultimate clause in section 34 of chapter 199 of the Public Statutes. Strike the legislative pen through those lines, and the work, in my judgment, with a little readjustment of machinery, is done. I have already shown how the fee system operated with clerks of courts. It is worse with officers of the police force, without intending to imply that those officers are dishonest. It is inherent in the system. It is one vast "Serbonian bog," in which annually sink millions. It should be plucked up root and branch. I have shown how the capias, the mittimus and the subpœna are abused. I will give a few more practical illustrations of the system, so it may appear how cities and towns are deriving revenue from the counties, as His Excellency suggested. Under the present system, there is every temptation to multiply frivolous complaints. Take this instance, which I have seen over and over again. A poor man is brought into a police station maddened with rum. It takes "aid" to arrest him, and then a hack must be employed to transport him to the station, where he is locked up for the night. Before morning he breaks his cell furniture, and very likely a light out of a door, and may assault or resist an officer on the way to or from the station. Now he lands in court, and what can the officer do in the way of complaints? He may make one for drunkenness; one for disturbing the peace; one for malicious mischief, in breaking crockery, — "the property of the city aforesaid;" one for another kind

of malicious mischief, in breaking a door or window; and another for assault or resisting an officer. I have actually seen three of these complaints in one case; and all are possible, — all will "lie" under the statutes. Now the thrifty officer begins that taxation of costs which is his delight and support, full fees for service of each warrant, when only one warrant was necessary, but *attendance* in only one complaint. And a great retinue of witnesses will attend this poor man into the assizes. Of course he will plead guilty, and must be sentenced on each complaint. The humane magistrate will inveigh against such a proceeding, and mitigate sentence as much as possible; but he *may* sentence him on each complaint, "to take effect after expiration of a former sentence this day imposed," for something else. Then separate mittimuses may be made, and the marshal with his own team, for which he will swear he has expended seventy-five cents, when the law says, "if he uses his own team," one mile, he shall have only fifteen cents for it, will furnish transportation to the house of correction, and the poor victim at length is lodged in custody, fifteen or twenty dollars in costs having been piled up; while the respectable rumseller is selling to some other poor fellow.

Here is another case, where a justice of the peace to issue warrants issued three hundred warrants, and only fifty were returned to court, with twenty-five convictions. Another year he issued one hundred and sixty warrants; only sixty were returned to court, thirty without service, and seventeen convictions resulted. In one day a complaint was issued against a man for threatening to assault, and another for making the assault. In one day thirteen complaints were made against the same man, for identically the same offence, — selling liquor. Of course such cases may be possible, and all may be meritorious; but it makes a judicious magistrate grieve to contemplate such a condition of things. Again, in one day fifty-four drunks were in a court, and the city marshal drew a dollar on each warrant for "attendance," and the city he served so well received fifty-four dollars at least for that day's work, the marshal being paid a salary. If the defendants paid, that would be one thing; if not, the poor county must pay it. And hence it is easy to see how

revenue is gathered in. The law is a premium on such business. The best city marshal will be the one who can get the most money out of the county; and to do this he must make as many complaints as possible. I have already referred to the search warrant. That instrument is the most potent in the law for some purposes, but it is susceptible to terrible abuse. I will quote from the testimony in 1880, Senate Document 225, page 91: —

> There was a very large amount of time spent with trial justices and State constables then exercising power, and we found a very great looseness there. A great amount of money of the counties and time of the officers was spent in getting out search warrants where there was not the least possibility of finding anything. It seemed to me, that, if they were out of food, they would get a search warrant and get some. I haven't any doubt that more than one hundred thousand dollars of money were spent in that way in places where there wasn't anything more than there is in this room (the committee room).

This was the testimony of the chairman of the committee which investigated trial justices in 1874. The constables have gone, but the search warrant remains. I will not multiply cases, but will say I have found a new fee down in Plymouth County, — a "back-warning" fee, where the officer warns witnesses not to come, for the trial has been postponed. This is an excellent fee, if the officer makes the travel; but, if he does it all by telegraph or telephone, constructive travel ought not to be charged. These abuses are patent. Officers confess they have to do things they are almost ashamed of, because the compensation is inadequate. I ought to refer to what will appear by examining the dockets of the superior court, and what district attorneys will testify to, of the wreckage of bad complaints, frivolous complaints, that come up to that court from trial justices. These justices do good work, but it cannot be expected that they can draw a complaint for embezzlement or perjury, or many other of the difficult complaints. They should not be tempted to live out of these fees. A justice of the superior court summed it all up, when, one day, a witness being asked what his business was, replied, "I am a trial justice." Dropping his pen, the judge said, "I hope, Mr. Witness, you do

not mean to tell the jury you get a living by being a trial justice." The fee system ought to go. Governor Andrew's idea to pay salaries is worth considering. A good trial justice is the best man in the community; a bad one is a nuisance. Then let the fee system be abolished; let towns and cities pay their own force, as they do now, practically; bring local option home to the people, and frivolous complaints and fees for constructive travel will cease. I believe the united testimony of officers, clerks, sheriffs, judges, district attorneys, all voting by the "Australian ballot," will say the present system cannot be limited or controlled. Boston illustrates it all. That city pays its own police force. Why should it pay the city of Chelsea $8,000 a year to give its police force a double salary? Why should any county pay a city marshal fifty-four dollars a day for attendance? How can this fee be defended in morals? The law was made when one arrest a day was as much as could be expected, and a dollar was none too much. But now nearly all towns of any magnitude, and all cities, have their salaried force. One salary should be enough. The county ought not to pay a second one.

One thing more, by way of suggestion, if the present system is to continue. By the report of the prison commissioners, it appears, in the year ending Sept. 30, 1887, there were in this State 68,000 arrests.* The number arrested in the cities for drunkenness, assault and larceny, was 44,331; towns, 7,453. Arrests in all cities, 55,853; all towns, 11,838. The best estimate I can make is, that about 45,000 arrests for drunkenness are made in one year, and about 19 out of 20 plead guilty. Suppose, now, these 45,000 men are taken into court without witnesses, as they are taken without warrants, and disposed of; 42,750 will plead guilty, and in that way the witness fee of sixty cents in each case will be saved to the families of these men, — a sum equal annually to $25,650. If no warrant is made, as there need be none, the return of the officer being made on the complaint, the law will be complied with, and the costs, of about $3.00 on each warrant, could be saved, — another sum, equal to

* In 1888 the number of arrests in the State was 76,237, of which 48,153 were for drunkenness.

$128,250, will thus be saved. Then let the court keep one day behind its business, take the pleas of the men, and those who contend will have a day to get sober in, and be in condition to defend. Practically, now in busy courts this has to be done, and in one police court the judge instructs the officer not to bring in the witness when he brings the man. The glory of the probate court now is, that it hears routine business on the statute days, and assigns all hearings, on their merits, to special days, when time can be taken without crowding the court house with witnesses.

A curious fact is developed by a study of the tables of this report. It is that the county now receives from the inferior courts, in fines and costs, just about what it pays back to cities and towns under the present arrangement, with the roundabout and costly method of certifying and paying costs. In order to carry this measure, and not encounter the opposition of the cities, I would have all fines paid in the inferior courts paid to the town or city whose officer prosecutes the complaint, and do away with costs entirely. Let the judges consider the amount of costs incurred, and embody it in the sentence, as is now done in Boston in the criminal courts. The fine in those courts for drunkenness is five dollars, without costs; and it is of no consequence what the costs are, for they are not paid, except the actual expense of the officer.

This principle is established in by-law cases already, also in chapter 159, section 70, Public Statutes. No officer in Boston is paid anything, for summoning witnesses from any part of the State, except travelling expenses. So for summoning jurors (chapter 357, Acts of 1888). Such is also the rule with district police officers.

I recommended the extension of this section 70, chapter 159, Public Statutes, to the whole State, last winter, but it did not commend itself to the judiciary committee. It seems to me, what is good for Boston is good for all. The officers of Norfolk and Plymouth counties last winter petitioned for salaries for criminal business, and their petition came over to the present Legislature, where it now pends. An order was introduced last winter to consider the whole question of taxing, certifying and paying costs, which also comes over

to this general court, so the whole question is broadly before the Legislature.

As I do not believe in criticising a system without indicating a plan of bettering it, I venture to submit a draft of a bill which, in substance, embodies my views.

AN ACT RELATING TO THE PAYMENT OF FEES TO COURTS, AND OFFICERS RECEIVING A SALARY, AND TO FINES AND COSTS IN CRIMINAL CASES.

Be it enacted, etc., as follows:

SECTION 1. Section thirty-four of chapter one hundred and ninety-nine of the Public Statutes is hereby amended to read as follows: No officer in attendance upon any court, and no sheriff, deputy sheriff, jailer, constable, city marshal, or other officer, who receives a salary or allowance by the day or hour from any county, city or town for his official services, shall be paid any fee or extra compensation whatever for any official service in any criminal case rendered or performed by him, nor for testifying as a witness therein, during the time for which he receives such salary or allowance. No fees of such officers for services, or as witnesses in criminal cases, shall be allowed or taxed in any such case; and no justice's fees or court fees shall be allowed or taxed in any criminal proceeding whatever before a trial justice whose salary is fixed by law, or before any police, district or municipal court; nor shall any such fees be paid to any county, city or town; but all fines and forfeitures recovered as a punishment for any offence, or for the violation or neglect of any duty imposed by statute, where no other provision is especially made by law, shall, in such criminal cases as are brought before the court or magistrate by such officers who at the time receive such salary or allowance, be paid to the city or town from which such officer receives such salary or allowance. The treasurers of such cities, towns, or counties shall furnish to the district attorneys, courts and magistrates, certified lists of such officers, and keep the same duly revised; and no fines shall be paid over to such treasurers until such lists are so furnished; but the expenses of such officers necessarily and reasonably incurred and actually disbursed in any such case shall be allowed and paid to them by such treasurers.

SECT. 2. No part of the costs, as such, in any criminal proceeding, shall be taxed against the defendant; but the magistrate or presiding justice shall, at the time of the trial, inquire what expenses were necessarily and reasonably incurred in convicting the defendant; and the total amount or any part of such expenses may be embodied by the court or magistrate in the fine when sentence is imposed. All fines imposed in the superior court, and all fines paid by defendants after commitment, shall be paid over to counties as now provided by law.

SECT. 3. All acts or parts of acts inconsistent herewith are hereby repealed. This act shall take effect in three months after its passage.

This proposed amendment is necessary: —

I. To take away from magistrates or officers their direct pecuniary interest in the penalty paid by defendants.

II. To prevent magistrates or clerks imposing through the costs double or quadruple the nominal penalty imposed in open court, whereby one defendant is made to pay double the penalty imposed on another for the same offence.

III. To remove from clerks and magistrates the temptation to defraud either the defendant or the treasuries, by making the penalty imposed a fixed sum declared in open court and based on the sworn testimony there offered, instead of an entirely uncertain sum, fixed only by the personal view of taxation of costs entertained by an officer who is often directly interested therein.

IV. To avoid transferring and retransferring substantially the same sum in and out of the county treasuries, only to place it finally in the city or town treasuries, at considerable loss to the counties, and no gain to the cities and towns, who will rather benefit by the proposed change.

The penalties need not be lessened by the operation of this act, and no treasury or individual will suffer loss.

The work of trial justices, their fees, and those of deputy sheriffs, will have to be guarded carefully; but there will be no difficulty on that score, I apprehend. This law, or one substantially like it, is in force in Vermont, and works well there. It brings home to the people the expense of criminal matters. It is local option only. The small towns will not be taxed to pay police officers in cities, for work good or bad. These towns will be taxed to pay for judges, juries and the superior courts, precisely as they are now. If this question of costs can be satisfactorily disposed of, the schedules of costs that accrue in trial justice courts could come direct to this office, where they could be audited before payment by treasurers. The penalty for drunkenness will need to be changed so that it shall not exceed ten dollars. Now it cannot exceed five dollars and costs; but the costs often bring the penalty above ten dollars.

I submit this plan as the best I can devise, after conference with almost all the officials of the State.

A Committee of the Legislature on County Finance.

With the greatest deference, I beg to suggest to the Legislature the necessity of a committee on county affairs or county finance. The committee on county estimates seems to me too limited in its scope. A bill from the committee

on public service, or from any other committee which calls for money out of the State treasury, has to go to the committee on finance in the House, or the treasury in the Senate, and "there's the rub" usually with a salary bill. But it is not so with county affairs. A bill calling for money out of the county treasury has only to run the gauntlet of one committee before consideration by the two branches. If the jurisdiction of the committee on county estimates were extended, or all money bills were sent to the committee on finance, the counties would be doubly protected, as the State is, under the present rules and practice.

Now, as to the tables annexed: A few officers have been so dilatory in making their returns, which are all due January 15, that I cannot do more than glance at these tables. It will appear that a little more money has been paid in than last year, and there has been large increase of business in some courts. The police court of Springfield, and the central district court of Worcester, have fallen off largely, apparently; but not in reality, because those courts did not receive back anything from the counties, as heretofore, but the "short costs," so called, were paid directly by the treasurers, according to law, as I believe.

The receipts of clerks of the supreme and superior courts apparently have fallen off largely, except the supreme court of Suffolk, and the superior court of Suffolk for civil business. This apparent loss is on account of the salary bill of last year, — the new declaration of independence. That law went into effect July 1, 1888. So the clerk's income since that time has not properly included any fees for work done in criminal matters, or for work done for the county commissioners, or otherwise for the county. That is to say, since July 1 last, the income of the offices of clerks has come from fees received from parties in civil actions entirely. This fact makes plain the fallacy of the old system, as before suggested. More than half the fees, except in Suffolk, have come to the clerks from this criminal business and work for the counties, all which was paid for out of the county treasury; and in some counties, Worcester for one, all the work in criminal business and for the county commissioners was done by the assistant clerk.

In the superior court of Suffolk for criminal business, it appears the clerk for the last six months of 1888 has really only about $110 of income outside of money paid into court in lieu of bail, etc. That is to say, heretofore his income has all come from the county, he doing only a criminal business.

It is also to be noticed that the clerks in certain counties received fees after July 1. This was on account of a misapprehension as to what I said at a conference of the clerks when the salary bill was being framed. It was suggested that costs in criminal business must be taxed as before; and some of the clerks understood they were to tax in all matters as before, but pay over all fees received to the treasury, which they have done. This was done in part to prevent a too sudden shrinking in the income of their offices, which it was apprehended the public might not understand. Of course the clerks do as much work as before, unless by improved methods there is less work to do; but the pay for it all comes by way of the salary, which I believe is a great relief to all. The Attorney-General has given an opinion, that, since July 1, 1888, no fees are payable by the county to clerks of courts for any services whatever.

I cannot close this my really first report, without saying it must be obvious now why I did not report in detail to the preceding Legislature. I found that, in the course of my duty, I had to review the official acts of a network of civil officers, extending from the constable in the island counties to the justices of the highest courts. It was a delicate duty to perform, and I wanted the law specifically behind me. The work of this office is essentially that of examination or inspection, no voucher coming to me until the same has been paid. I am to see that officers keep up to the key-note of duty. I did not think it wise to go a whit beyond the law in making my first report, and therefore asked for further legislation, which was granted, but after the time for my first report. I have carefully studied the whole system of county affairs; have freely and fairly, as I hope, discussed county matters with all officers concerned; and have found a universal desire to have done what is for the best. It is not to be wondered at that some laws are found obsolete, some difficult of enforcement, and some ambiguous or doubtful.

I have criticised a system, and not men. The only irregularities during the year were with the jailer in Hampshire County, where there was something wrong in regard to county stores, but of trifling account. The officer was promptly removed by the proper authority, and I found the money affairs of the house of correction at Northampton all right. The unfortunate affair at Nantucket has already been referred to. It came in part from loose methods of doing business; and, if the treasurer of that county had paid money to the parties to whom it was due, and not to the clerk, there would have been little harm. It shows the tremendous power of the clerk of courts, with the seal of the commissioners, and the opportunity to wreck his county if he should desire. No State has a better record than this, in respect to the action of its civil officers. Both myself and clerks have been received with the greatest cordiality by all officers, whom we are compelled to meet without notice or warning. I have endeavored to carry out the letter and spirit of the law creating the office, and now report its scope, its power and its limitations.

I frankly say to the Legislature, that I think the salary attached to the office, and to that of my clerks, is not adequate to the delicate and responsible duties we have to perform. The commissioner who has to traverse the State has a harder duty than the one who sits in his office, and does his work there, and sleeps in his own bed every night. We have not to deal with soulless corporations; and a high grade of clerks is needed in this duty. Fortunate above all men in my choice of clerks, I specially commend them as worthy of increased compensation. Those who read between the lines of my report of last year, pencil in hand, saw that a vast sum of money was turned into the treasuries, more than the year before; and I am free to say I think we had something to do with it, and that there is an improved service all along the line.

EDWARD P. LORING,
Controller of County Accounts.

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